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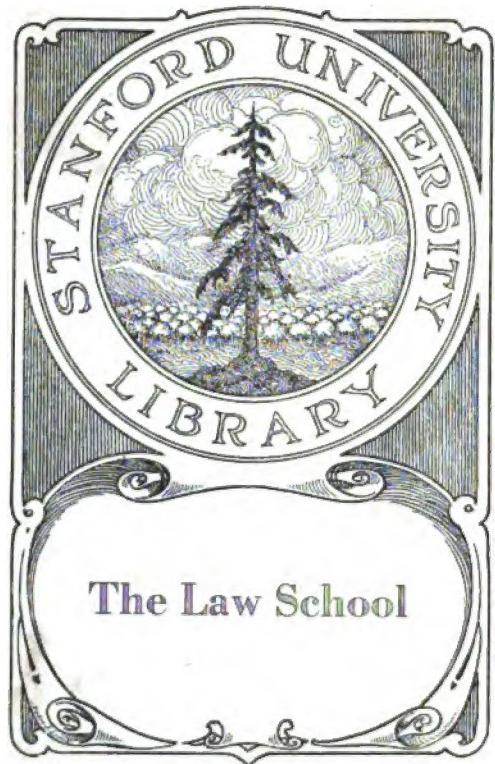
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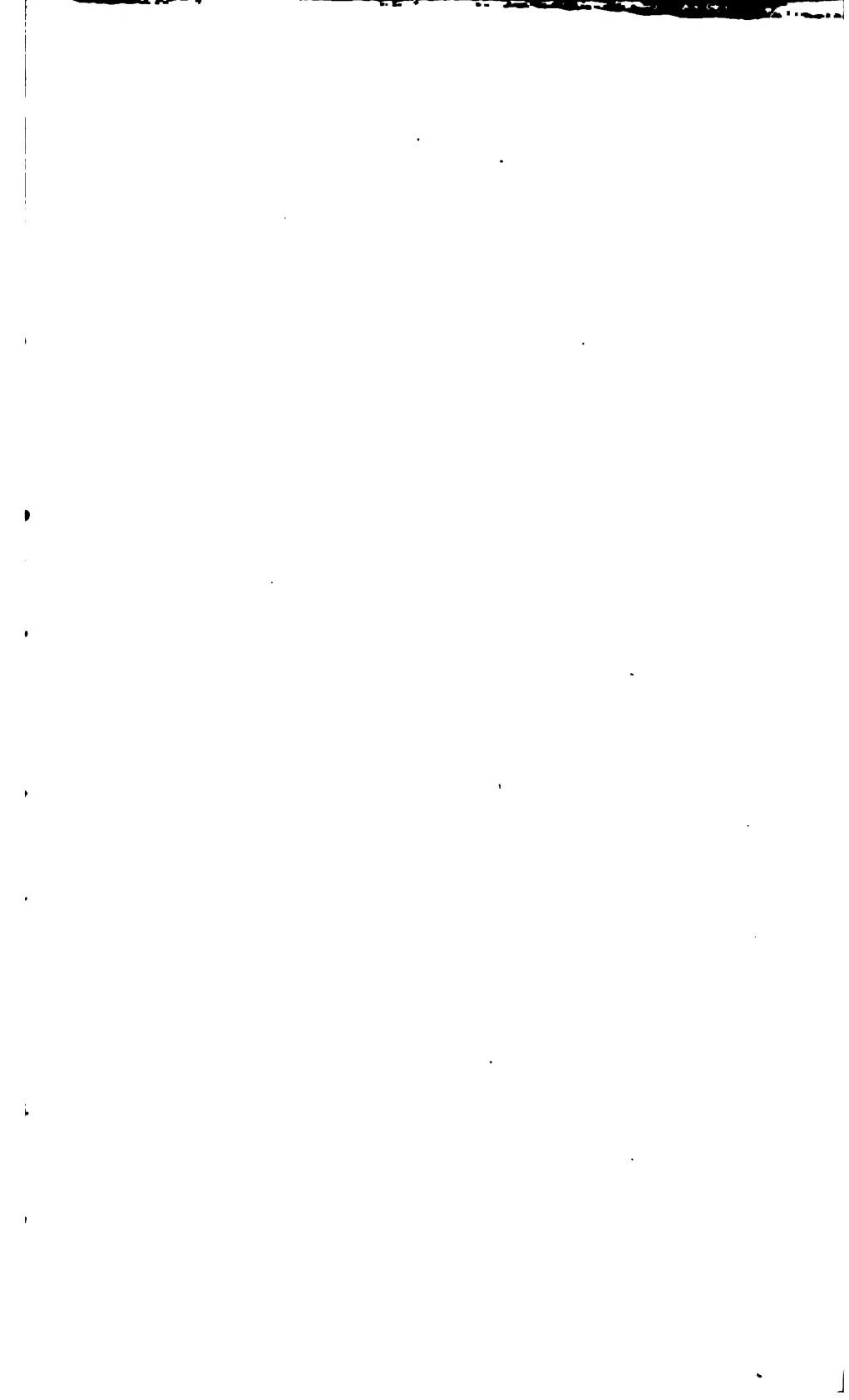
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The Law School









REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

Hillas' Reports

HERETOFORE CONDENSED BY

HON. THOMAS SERGEANT AND HON. THOMAS M'KEAN PETTIT.

Now Reprinted in Full.

VOL. VI.

CONTAINING

*The Cases in the Court of Common Pleas, from Easter Term to Trinity Term, 1 and 2 Geo. IV.;
and in the Court of King's Bench, in Michaelmas, Hilary, Easter, and
Trinity Terms, 1 and 2 Geo. IV., 1820, 1821*

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,
NO. 585 CHESTNUT STREET.

1869.

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REPORTS OF CASES,

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IN THE

COURT OF COMMON PLEAS.

And Other Courts.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY

WILLIAM JOHN BRODERIP,
OF LINCOLN'S INN,

AND

PEREGRINE BINGHAM,
OF THE MIDDLE TEMPLE, ESQRS., BARRISTERS AT LAW.

VOL. II.

CONTAINING THE CASES FROM EASTER TERM, 1 GEO IV., TO
TRINITY TERM, 2 GEO. IV.

BOTH INCLUSIVE.

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JUDGES
OF
THE COURT OF COMMON PLEAS,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir ROBERT DALLAS, Knt. Lt., Ch. J
Hon. Sir JAMES ALLAN PARK, Knt.
Hon. Sir JAMES BURROUGH, Knt.
Hon. Sir JOHN RICHARDSON, Knt.



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I N T H E F I R S T Y E A R O F K I N G G E O R G E I V .

Willoughby

P R O M O T I O N S .

In this term, *Henry Brougham*, of Lincoln's Inn, Esq., barrister at law, having been appointed attorney-general to the queen, and

Thomas Denman, of Lincoln's Inn, Esq., barrister at law, having been appointed solicitor-general to her majesty, took their seats within the bar accordingly.

WALKER v. MILLS. (a)

An unqualified person, by the orders and in the presence of his master, a qualified person, set on his master's grounds a trap for hares, &c., and afterwards, finding a hare therein, carried it, according to order, to his master, who was not present when the hare was found: Held, that the defendant was not liable to the penalties for using snares to destroy game, or for exposing game to sale.

D E B T to recover penalties on 5th Anne, c. 14, s. 4, and 9th Anne, c. 25, s. 2, for using a snare to destroy game (the defendant not being qualified,) and for exposing "a hare to sale." Plea, general issue. The following facts were proved before GARRON, B., at the last Sussex assizes. [•2]

The defendant, a cottager in the employ of a qualified person, was on Sunday morning, found with a hare in his possession, which he had just taken out of a trap placed on his master's property. The master stated, that the trap was placed there on the Thursday preceding by his direction, and in his presence, for the purpose of catching hares and rabbits which had annoyed him; that the defendant had received orders from him to bring to his (the master's) residence, whatever might be caught in the trap, and that the defendant had, accordingly, brought the hare in question to him on the Sunday morning on which it was seen in the defendant's possession.

The learned judge thought the point new, but having directed the jury that this resembled the case of a qualified person attended by persons unqualified, assisting him in the operations of sporting; that the defendant was acting as servant to his master, and under his directions; and that, therefore, the possession

(a) Park, J., was absent the whole of this term, from indisposition.

of the hare by the servant must be taken to be the possession of the master; the jury found a verdict for the defendant.

D'Oyly, Serjt., now moved to set aside this verdict and have a new trial on the ground of a misdirection, contending, that the result of the various cases on this subject was, that the right of a person qualified to kill game did not extend to the protection of persons unqualified, unless the qualified person were actually present: and that a qualified person had no right to send out one unqualified to kill game for him; that the master, in this case, though present at the setting of the trap, was absent when the hare was caught and found in the defendant's possession, and that such possession constituted *an exposure to sale under the 9th Anne, c. 25, s. 2. He cited *Molton v. Cheeseley*, [3] 1 Esp. 123.

Dallas, C. J. Cases of this sort frequently run into very nice distinctions, and I would not hastily lay down a general rule which might afterwards be open to objection. If I had any doubt, I would look into the cases that have been referred to; but I have none: nor have I any hesitation in saying, that this action is most improperly brought. For what are the circumstances of this case? The defendant was the servant of a qualified man, who, finding his land annoyed by hares and rabbits, ordered this trap to be set, with a view to their destruction. I take it to be perfectly clear, that a qualified person has a right to order a trap to be set for such a purpose, even in his absence; but in this case, the qualified person was present, and superintended the setting of the trap. In this trap the hare was afterwards caught, and the catching was a catching by the master on his own land. Then as to the possession, the master ordered, that whatever was caught should be brought to him: the hare was brought the moment it was taken, and the possession of the servant in the act of taking the hare to his master, was under the master's direction, and the same as the possession of the master.

Burrough, J. Actions of this kind do a great deal of mischief; there was no pretence for charging this defendant with an illegal taking or possession.

Richardson, J. The trap being set by the master's order and in his presence, the hare was in effect caught by him. As to the possession, it is proved that he ordered his servant to bring to him whatever might be *taken; so that the case falls within the principle of *Warneford v. Kendall*, 10 East, [4] 19. The learned judge also referred to *Spurrier v. Vale*, 10 East, 413.

D'Oyly took nothing by his motion.

CROMACK v. HEATHCOTE, Esq.

An attorney, being requested to draw an assignment of goods, refused, and the deed was drawn by another. The validity of the deed being afterwards questioned, on the ground of fraud, in an action against the sheriff in which the attorney first applied to, was not employed. Held, that the communication made to this attorney was professional, and that evidence of the fraud purposed to be given through him was properly rejected.

TRESPASS against the sheriff for seizing goods under an execution. The defence set up was, that the goods had been conveyed by the father (against whom the execution issued) under a fraudulent assignment to the son. To prove the fraud, the defendant proposed, among other evidence, to call Smith, an attorney, to whom the father had applied to draw the assignment, and who had refused to draw it, knowing that an execution had been issued against the father. This attorney was not employed in the cause, and did not draw the assignment.

Richards, C. B., before whom the cause was tried at the last Hertfordshire assizes, rejected this evidence, on the ground that it was a confidential communication made to an attorney. The jury found a verdict for the plaintiff.

Taddy, Serjt., now moved to set aside this verdict and have a new trial, on

the ground (among other objections) that this evidence had been improperly rejected. He contended, that the rule, as to the exclusion of the evidence of solicitors touching matters on which they had been consulted, extends only to communications made in the *progress of a cause; and urged that a solicitor had been examined touching a dissolution of partnership, (a) and to prove the usurious consideration of a deed he had drawn, *Duffin v. Smith, Peake N. P. C.* 146: and that Lord KENYON seemed to confine the rule to communications made in the conduct of a cause, *Cobden v. Kendrick*, 4 T. R. 431. He cited also *Wilson v. Rastall*, 4 T. R. 753, and *Du Barré v. Livette, Peake N. P. C.* 108.

DALLAS, C. J. The plaintiff came to employ Smith as an attorney, though Smith happened to refuse the employment. The inquiry made by Lord KENYON in *Wilson v. Rastall* is, whether the party was as he *stated consulted professionally; and is not this a consulting on professional business? One is staggered at first on being told that there are decided cases which seem at variance with first principles the most clearly established; but the cases cited do not at all bear out the proposition contended for, and I know of no such distinction as that arising from the attorney being employed or not employed in the cause. To confine ourselves to the present case: here is a client who goes to give instructions touching a deed, and the communication must be deemed confidential, as between attorney and client, though the attorney happens to refuse the employment. I have no manner of doubt on the subject; and it might be of most mischievous consequence if, by granting a rule, we should be supposed to have cast any doubt on it.

BURROUGH, J. It would be most mischievous if it were once doubted whether or no a communication such as this were confidential as between attorney and client.

RICHARDSON, J. Suppose the case of an attorney consulted on the title to an estate, where there was a defect in the title, can it be contended that he would ever be at liberty to divulge the flaw? I never heard of the rule being confined to attorneys employed in a cause. I am of opinion, that the communication in this case was of a nature not to be divulged by the attorney to whom it was made.

Rule refused.

(a) The reporters are indebted to the kindness of a gentleman at the bar, who was present at the time of the decision, for the following note:

WADSWORTH v. HAMSHAW and ASPINAL.

Coram, ABBOTT, C. J., March 1, 1819.

In an action against the defendants for goods sold and delivered, the question was whether the defendants were partners at the time the goods were delivered. On the part of the plaintiff, Hughes, an attorney, stated that the defendants had called upon him to advise them professionally, respecting the dissolution of their partnership. Gurney and Merewether objected to the admissibility of this evidence, upon the ground that what passed between Hughes and the defendants was a professional communication.

ABBOTT, C. J., without calling upon Scarlett, who was on the other side, ruled that the evidence was admissible; that the communication was not privileged; and that protection was only extended to those communications with an attorney which related to a cause existing at the time of the communication, or then about to be commenced. His lordship then cited a case of an action for bribery, tried on the Midland circuit, (and attended by Serjts. Adair and Wilson,) in which the attorney for the defendant was called to prove some communication with his client. The evidence being objected to by the defendant's counsel, was rejected; but upon an application to the court, a new trial was granted; and the court then decided, that no professional communication was protected except such as related to a cause.

*7] *ROBERT HINDE, Demandant, JOHN HINDE, Tenant, RICHARD BLANDE, Vouchee.

The court allowed a recovery to pass, where the certificate of the notary (that the party who made the affidavit of the caption and acknowledgment of the warrant of attorney was sworn in his

presence before the deputy fiscal at Cape Town,) omitted the day and month in the body of the certificate, but stated it correctly at the end, where the notary witnessed the instrument; the date of the jurat of the affidavit being the same as that at the bottom of the certificate.

Onslow, Serjt., moved to pass a recovery under the following circumstances.

The warrant of attorney was taken and acknowledged at Cape Town, Cape of Good Hope, before two commissioners. The usual affidavit of caption and acknowledgment was sworn before the deputy fiscal at Cape Town, by G. C., one of the commissioners, on the 31st of July, 1819; endorsed on the affidavit was a certificate of a notary public dwelling in Cape Town, that the commissioner who had made the affidavit of the caption and acknowledgment, was sworn in his (the notary's) presence to the truth of the same affidavit, before P. B. B., on the day of , 1819; and he further certified, that the said P. B. B. was deputy fiscal, and as such, usually administered oaths, and had power to administer such oath, and that the name subscribed to the said affidavit, and also the name of P. B. B. subscribed to the jurat, were of their respective hand-writing. To the end of this certificate, the notary public making it had put the date of the 31st of July, 1819, his name and description, and also, as was supposed, (for the wax was gone,) his notarial seal. The only question was, whether the recovery should pass, there being a blank in the body of the certificate for the day and month when G. C. was sworn to the truth of the affidavit, of caption and acknowledgment. The learned serjeant prayed that the recovery might be allowed to pass, notwithstanding this blank; and urged, that the date of the certificate, (31st July,) being the same as that of the jurat of the affidavit of caption, there was sufficient evidence that the certificate *was a certificate of the oath being taken on the same 31st of July, and that it [*8] could not be of a subsequent day.

Rule granted for the recovery to pass.

DINSDALE, Assignee of the Sheriff of MIDDLESEX, v. EAMES.

The defendant in an action on a bail bond (given in an action of debt against himself) becoming bankrupt between plea and verdict in the action on the bail-bond, and obtaining his certificate after judgment, is discharged from the damages and costs.

ON the 3d of June, 1819, the defendant was sued on a bail-bond given by him in an action for debt against himself. On the 17th of June he pleaded to the action on the bail-bond; on the 4th of November he became a bankrupt, and a commission issued against him in the course of that month. The action on the bail-bond came on to be tried at the sittings in Hilary term, 1820, when a verdict was found for the plaintiff. Judgment was entered up, and the defendant taken in execution for damages and costs on the 29th of March, 1820; on that day the defendant's certificate under the commissioner of bankrupt was allowed by the chancellor, having been signed by the creditors on the 8th of February, in the year last mentioned. When the defendant was taken in execution he paid the plaintiff's attorney 5*l.* towards the damages and costs.

Pell, Serjt., having obtained a rule *nisi* to have this sum, paid under the writ of *ca. sa.*, restored to the defendant or his attorney,

Tuddy, Serjt., now showed cause against the rule. The question is, whether a defendant in an action on a bail-bond, becoming bankrupt between plea and verdict, *and obtaining his certificate after final judgment, is discharged from the damages and costs. He is not discharged, because the debt is [*9] not one that can be proved under the commission; till judgment is given, it cannot be ascertained what is due for costs, either in the original action, or the action on the bail-bond. The various cases (*Ex parte Hill*, 11 Vesey, 646: *Ex parte Charles*, 14 East, 198; *Walker v. Barnes*, 1 Marsh. 346; and *Buss v. Gilbert*, 2 M. & S. 70, establish this principle, that where the cause of action is incomplete, even though that which is necessary to complete it be costs

only, the debt is not provable under the commission. [DALLAS; C. J. In most of those cases the defendant was sued on a tort.] The judgments do not appear to have been affected by that circumstance, but to have turned on the principle that the demand was incomplete. *Bouteflour v. Coats*, Cowp. 25, is contrary to law and practice; for costs are never proved under a commission when the verdict is after the bankruptcy. (*Ex parte Hill*.) In *Ex parte Charles* there was a verdict before the bankruptcy; but the case of the plaintiff is stronger, for here the verdict is after the bankruptcy. *Cockerill v. Owsten*, 1 Burr. 436, is almost in point; and the case of *The Overseers of St. Martin's in the Fields v. Warren*, 1 B. & A. 491, shows clearly, that an unliquidated demand arising on a bond cannot be proved as a debt under the commission.

Pell, Serjt., in support of the rule, relied on *Bouteflour v. Coats* as in point, and on *Scott v. Ambrose*, 3 M. & S. 326. In *Cockerill v. Owsten* it did not appear that the bond was forfeited at the time of the bankruptcy; and in *St. Martin's in the Fields v. Warren*, which was a case on a bastardy *bond *10] it would have been necessary to assign breaches, whereas in the present case the amount of the original debt was known and ascertained. Under the 5 Geo. 2, c. 30, the defendant was entitled to be discharged from all debts due and owing at the time of the bankruptcy: if he could be discharged from the original debt, why not also from this substituted debt?

DALLAS, C. J. The debt was contracted with certainty before the bankruptcy of the defendant, and therefore might have been proved under the commission. The case of *Bouteflour v. Coats* is directly in point, and has never been overruled or questioned in any subsequent decision; and *Scott v. Ambrose* has decided that the costs bear relation to the original debt. The rule must be made absolute.

BURROUGH, J. The case *Ex parte Charles* has no application to the present. If this had been an action of trover, the case might have been different, but the debt, for which the defendant was sued, is one which is clearly barred by his certificate,

RICHARDSON, J. The substance of the action on the bail-bond is the same as that on the original debt; the costs are accessorial, and the hardship upon the plaintiff is not greater than in many other cases which arise unavoidably under the bankrupt laws.

Rule absolute.

*11]

*BRANDON and BROWN *v.* HUBBARD and KEYS.

A replevin clerk, who is partner in an attorney's firm, must sue alone for the expenses of preparing a replevin bond, though it be prepared at the office of the firm.

ASSUMPSIT against the defendants for work and labour done for them by the plaintiffs. It appeared on trial at the last Stafford assizes, before HOLROYD, J., that the plaintiffs (attorneys) were partners, that Brandon had been appointed, solely, replevin clerk to the sheriff, but that the business of the replevin clerk was transacted in the office of Brandon and Brown. A replevin bond (for the costs of preparing which, among other things, the present action was brought) was filled up, the stamp provided, and other business relating to the same, done for the defendants, in the office of Brandon and Brown. The counsel for the defendants objected that there was a misjoinder; for that Brandon alone being the replevin clerk, was alone interested in this suit. HOLROYD, J., thought the objection well founded, and nonsuited the plaintiffs; but gave leave to move to enter a verdict for them for the amount of the costs of preparing the replevin bond, &c. Accordingly, Peake, Serjt., now moved to set aside this nonsuit, and enter a verdict for the plaintiffs. He contended that the statutes 1 and 2 Ph. and Mar. c. 12, s. 3, and 11 Geo. 2, c. 19, s. 23, (the only statutes relating to replevin clerks) contained no directions about the remuneration to the sheriff,

or as to the person who should prepare the replevin bond. If, therefore, the bond was prepared by two partners, the expenses were as much the debt of one as of the other, though one only held the appointment of replevin clerk. If an action had been brought for any matter relating to the stamp, both would have been liable. He cited *Willett v. Chambers*, Cowp. 814, as the only case bearing on the subject.

**Sed per Curiam.* There is no doubt in the case. It was the duty of [*12 Brandon alone to make out the replevin bond, and Brown had nothing to do with it. The defendants dealt with Brandon in his capacity of replevin clerk, and not as the partner of Brown.

Peake took nothing by his motion.

HALFORD v. DILLON.(a)

1. By a settlement made on the marriage of Sir H. J. P. the estate T. was settled to the use of Sir H. J. P. for life, remainder to his first and other sons in tail male, reversion to Sir H. J. P. the settler, in fee. There was issue of the marriage, a son, J. P., who attained the age of twenty-one, but died in 1767 without issue, leaving Sir H. J. P., his father, him surviving. J. P. took upon himself, among other things, to devise the estate T. to his father for life, with remainder to his sisters of the half-blood, M. and A. in fee. Sir H. J. P. accepted certain benefits under this will; and in 1769 devised the estate T. (after the deaths of his daughters M. and A. without issue male) to H. P. for life, with several remainders over. In an action of replevin, by a person claiming under the will of Sir H. J. P., the avowant, who claimed as heir of A., read in evidence the answer of the real plaintiff to a bill filed against him by the avowants, in which answer the real plaintiff admitted that he believed that certain articles of agreement between Sir H. J. P. and his son J. P. were made in the year 1766, whereby J. P. agreed to pay 700*l.* and an annuity of 200*l.* per annum to his father, who, in consideration thereof, agreed to convey estate T. immediately to his son, subject to a proviso, that if the son should die in the lifetime of the father, the conveyance was to be wholly void: *Held*, that Sir H. J. P. was not, by accepting benefits under the will of J. P., divested of the reversion in estate T.; that M. and A. took nothing in the estate under the will of J. P.; and that, on the trial, it was not necessary for the judge to direct the jury to presume, that some conveyance of the reversion in fee had been made by Sir H. J. P. to his son J. P.
2. The letters of a party, under whom the plaintiff did not claim, were held inadmissible as evidence to affect the plaintiff's title.

DALLAS, C. J.

THIS was an action of replevin, brought by the plaintiff for taking and detaining his goods. The defendant avowed in the common form for certain rent of the *locus in quo* and other premises, which he alleged *to have been [*13 holden by the plaintiff as tenant to the defendant. The plaintiff, by his plea in bar, denied the holding *modo et forma*; whereupon issue was joined, and at the trial(b) a verdict was found for the plaintiff. The defendant has moved for a new trial.

The plaintiff's farm was demised to him in 1805, by Ann Parker, by lease to hold from the 29th of September, 1805, for fourteen years. Ann Parker died in January, 1814, and the defendant was her heir at law. The real plaintiff in the action was Sir William Parker, Bart., to whom the plaintiff Halford had attorned and paid his rent; and the question was, whether Ann Parker was tenant in fee of the premises under the will of her brother of the half blood, John Parker, Esquire, as the defendant contended; or tenant for life only, under the will of her father, Sir Henry John Parker, Bart., as was contended on the part of the plaintiff. By indentures of lease and release, bearing date the 1st and 2d of October, 1741, and made on the marriage of Sir Henry John Parker, the father, with Catherine Page, the Talton estate (whereof the premises in question formed a part) was settled to the use of Sir Henry John Parker for life with

(a) The facts and argument in this case are so sufficiently stated in the judgment of the court, that it was deemed unnecessary to report them at greater length. Lens, Serjt., showed cause against the rule, which was obtained and supported by the defendant in person.

(b) Before Richardson, J., Worcester summer assizes, 1819.

remainder to his first and other sons in tail male, with reversion to the settler in fee.

There was issue of this marriage one son, John Parker, who attained the age of twenty-one, but died in 1787 without issue, leaving his father, Sir Henry John Parker, him surviving. Sir Henry John Parker, therefore, (unless he had done some act to deprive himself of the reversion in fee retained to him by the settlement of 1741,) having survived his only son, had power to dispose by his will of the reversion in fee; and he, by his will, bearing date the 10th day of November, 1789, devised the Talton estate, after the deaths of his daughters

*14] *Margaret and Ann Parker without issue male, to Hyde Parker for life with remainder to his first and other sons in tail male, with remainder to William Parker (eldest son of Sir Hyde Parker) for life, with remainder to his first and other sons in tail male, with remainder to William Parker (now the said Sir William Parker, Bart., and eldest son of William Parker, the son of Hyde Parker) for life, with divers remainders over. And he declared it to be the true meaning of his will, that the above mentioned estate should, after the decease of his daughters Margaret and Ann Parker, without issue male, constantly go along with and descend into the right heir male of the Parker family in the manner he had limited the same; as such heir male would inherit his title, therefore, it was his will that such his estates and title should descend and be enjoyed together as long as might be, and the laws of England would permit.

Sir William Parker, Bart., therefore, the real plaintiff, insisted, that, all intermediate persons being dead, he was now entitled to the premises in question under the will of Sir Henry John Parker.

Mr. Dillon, however, contended, that Sir Henry John Parker had no power to dispose, by his will, of the Talton estate, he being, as was contended, at the time of making his will, seised for life only of that estate. And this was contended on two grounds. First, That Sir Henry John Parker, having accepted certain benefits devised to him by the will of his son John Parker, (which John Parker had taken upon himself by the same will to devise the Talton estate to his father for life, with remainder to his sisters of the half blood Margaret and Ann Parker in fee,) had, thereby, elected to abide by and confirm his son's will in all parts; and that, by such acceptance and election, he was either actually dis-
*15] vested of the reversion in fee reserved to him *by the settlement of 1741, or else, that he and all persons claiming under him were estopped from setting up that settlement, or otherwise controverting the right of John Parker to dispose of the fee of that estate to his two sisters. Secondly, that the jury ought to have been directed to presume, that some conveyance of the reversion in fee had been made by Sir Henry John Parker to his son John Parker. On the first point, many equity cases respecting election, from *Noys v. Mordaunt*, 2 Vern. 581, to *Broome v. Monk*, 10 Ves. 597, were cited, from which it was argued, that the doctrine of election is a doctrine of the common law, and borrowed from thence by courts of equity; and that, although the interposition of a court of equity may, in certain cases, be necessary to compel a party to elect yet, that when he has made his election to take under the will, and has accepted the benefit thereby given to him, (as was argued to be the case here,) the aid of such a court was not necessary to divest him of any property which he held in repugnance to the will; but, that, in such case, he was *ipso facto* divested or estopped by the operation of the common law.

It was further argued, that, at the common law, a man may be estopped not only by record or deed, but also by matter *in pais*, as by the acceptance of an estate. And the court was referred to Littleton's chapter on Remitter, with Lord Coke's commentary thereon, and to other authorities respecting the surrender of an old, by the acceptance of a new lease, for the purpose of showing, that a man may

lose his older and better title to an estate, by accepting a conveyance from another. Lit. s. 667; Co. Lit. ibid.

And, finally, the court was pressed with the authority of two more modern cases, *Goodtitle, dem. Edwards v. Bailey*, Cowp. 597, and *Doe dem. D. of Devonshire v. Lord George Cavendish*, 4 T. R. 741, notis.

*As to the cases in equity, it appears to us, that the principle of them is entirely a principle of equity proceeding on the doctrine of an implied condition of which a court of equity will enforce the performance, viz. by compelling the devisee, if he elects to take the benefit of the devise, to convey over his original estate, so that it may pass in conformity to the will. These cases seem to us to afford no authority showing what the effect of such election is at the common law and without the aid of a court of equity.

As to the doctrine of estoppel, which forms an exception in certain cases to the doctrine of remitter, (as in the instance put by Litt. s. 664, where tenant in tail enfeoffs his heir of full age, who enters and survives his father, and is thereby estopped from claiming the estate tail *per formam doni*,) and also as to the doctrine of surrender of a lease by the acceptance of a new one, (as when a man, having a lease for twenty years, accepts from the same lessor a new lease for ten years, and is thereby estopped from claiming his old lease for twenty years,) all these are cases of two titles to the same lands, where a man, by accepting a new and inconsistent title, is precluded from setting up his older and better title to the same lands. It is obvious, that these cases fall very short of proving the point now contended for, and indeed have no application to it: the point being this, that a man, by accepting a title to Blackacre, is thereby divested or estopped from setting up his former title to Whiteacre.

As to the cases of *Goodtitle v. Bailey*, and *Doe v. Lord George Cavendish*, in the first, the court thought, that the release might well be construed as a grant of the reversion; which alone was sufficient to sustain the nonsuit: and, in the second, that the power was well executed, *in toto*, or, at all events, to the extent of giving to Lord George Cavendish an estate for life; in either of which cases the lessor of the plaintiff could have no right to recover. It is true, that the court, in the reports of those cases, appears to have thrown out more than was necessary for the decision, and more than perhaps is consistent with the strict legal view in which the action of ejectment is now regarded. These cases occurred at a time when that action was considered as a fictitious action, in which a different sort of title would suffice than what is required in a real action; and when it was thought that an equitable title would be sufficient to support or to defend an action of ejectment, contrary to the legal right of possession. That the court, in these cases, had in view the equitable title, which was then thought sufficient in ejectment, and not the strict legal title, is manifest from what Lord Mansfield is reported to have said in considering the doctrine of election, in *Doe v. Lord George Cavendish*, viz. "They (namely the late duke's children) claim great property under the Duke's will, and have taken it. If they reject his will, they must renounce all benefit under it. Therefore they are bound to suffer a recovery, or make the title complete." His lordship seems to consider that the obligation on the party to suffer a recovery and complete the title is, for the purpose of an ejectment, equivalent to a recovery actually suffered, and the title completed.

But this doctrine has been overruled by the cases of *Doe dem. Hodsdon v. Staple*, 2 T. R. 684: *Goodtitle dem. Jones, v. Jones*, 7 T. R. 47; and *Doe dem. Da Casta, v. Wharton*, 8 T. R. 2, and by the constant practice of courts of common law for these last thirty years.

As to the second point contended for by Mr. Dillon, namely, that the jury ought to have been directed to *presume, that some conveyance of the reversion in fee had been made by Sir Henry John Parker to his son John [18]

Parker, Mr. Dillon read in evidence at the trial, the answer of Sir William Parker to a bill filed against him by Mr. Dillon, in which answer Sir William Parker admits, that he believes that certain articles of agreement between Sir Henry John Parker and his son John Parker were made in the year 1766, whereby the said John Parker agreed to pay 700*l.* and also an annuity of 200*l.* per annum to his father; and his father, in consideration thereof, agreed to convey the Talton estate immediately to his son, subject to a proviso, that if the son should die in the lifetime of the father, the said conveyance was to be wholly void.

Mr. Dillon from that admission argued, not only that it is to be presumed that such a conveyance was in fact made, but, that it must be presumed to have been a conveyance operating according to the common law, whereby the freehold would pass to the son, subject only to a condition whereby the father was to be entitled to enter, in the event of his surviving his son; and, if so, then Mr. Dillon further argued, that it could not be presumed that the father had made an entry to enforce the condition broken.

To this argument it appears to us that a short answer may be given. If it is to be presumed that any conveyance was in part executed, it should be presumed that it was such a conveyance as would best effectuate the intention of the parties. Now the intention clearly was, that in the event, which has happened, of the father surviving the son, the conveyance was to be wholly void, and this intention might have been effectuated by a conveyance operating under the statute of uses, whereby, in the event contemplated, the use would have been *19] revested in the father, without the necessity of any entry. "On this short ground, therefore, without considering other grounds, we think no such conveyance can be presumed as would enable the son to dispose of the fee by his will.

Another question was made by Mr. Dillon, whether certain letters written by Sir William Parker, the father of the present Sir William Parker, ought not to have been admitted in evidence?

On this point we think it sufficient to say, that it does not appear to us, that the present Sir William Parker claims under the late Sir William Parker; and, therefore, we think that the letters of the former cannot be evidence to affect the title of the latter. On all these grounds we are of opinion that the rule for the new trial must be

Discharged.

DRAKE v. ROGERS and PULLAN.

The memorial of an annuity deed stated the consideration to consist of Bank of England notes, payable on demand, and of a draft payable at a banker's without specifying the time when. The annuity had been paid eleven years, and the attesting witness and agent of the grantee were both dead. The court set aside the securities on the ground that the memorial did not state when the draft was payable, or whether it had been in fact paid.

The memorial of an annuity, after reciting the indenture by which it was granted, stated the consideration of the annuity to be, "the sum of 85*l.* in notes of the governor and company of the bank of England payable to bearer on demand, and also the sum of 65*l.* by a draft bearing even date herewith drawn by John Moore *of No. 50, Great Marlborough Street, gentleman, on, and #20] payable at Messrs. Birch, Chambers, and Hobbs, bankers, Bond Street, London, to Thomas Rogers, in his own person, (by and with the privity and consent of Benjamin Pullan testified by his executing the said indenture,) well and truly paid by the said John Drake, immediately before the execution of the said indenture, the receipt whereof the said Thomas Rogers did thereby acknowledge, and of and from the same, and every part thereof, did thereby acquit, release, and for ever discharge the said John Drake, his heirs, executors, administrators, and assigns and every of them."

Rogers was an under graduate of Cambridge. The annuity was granted by

the defendants in 1808 for their lives, and the life of the longer liver of them, and secured by a warrant of attorney to enter up judgment for 300*l.* John Moore, who had acted as Drake's agent, and Luke Nayler, the only attesting witness, died, the former in 1814, the latter in 1818. The annuity was paid up to the 31st May, 1819.

Judgment had been entered up on the warrant of attorney on the 19th October, 1808, as of the then preceding Trinity term.

Blosset, Serjt., in the last term had obtained a rule *nisi* to set aside the judgment signed upon this warrant of attorney, and to stay execution, on the ground, that the memorial did not set forth when the draught for 65*l.* therein mentioned was payable, or whether it ever had been really paid. He cited *Rumball v. Murray*, 3 T. R. 298; *Berry v. Bentley*, 6 T. R. 690; and *Poole v. Cabanes*, 8 T. R. 328.

Onslow, Serjt., now showed cause against the rule. In *Rumball v. Murray*, and *Berry v. Bentley*, it appeared "clearly that the checks had not been paid before the execution of the indenture." *EYRE*, C. J., in *Morris v. Wall*, 1 B. & P. 208, laments that such a decision as took place in the above cases should ever have been come to; and in *Ex parte Maxwell*, 2 East, 85, Lord KENYON refused to set aside an annuity where the witnesses were dead and the annuity had been paid seven years, intimating that by analogy to cases under the statute of limitations, the objection should be made within six years. In the present case the witnesses are dead, and the parties have lain by for twelve years. In *O'Callaghan v. Ingilby*, 9 East, 135, the consideration was stated to have been paid "at or before" the execution of the deeds, and held good. Here it is said to have been paid "immediately before;" which is a much stronger expression than any which those cases contain. The court cannot now be called on to infer that the sum of 65*l.* mentioned in the memorial was a draft not turned into cash. A banker's check is commonly considered as money. *Ex parte Michell*, 2 East, 137.

Blosset, Serjt., in support of his rule. The annuity was here granted by an under-graduate, and a time has elapsed since the grant of it, sufficient to repay the consideration-money, principal, and interest, over and over again. But the legal objection is that which was stated on moving for this rule. The draft is described as payable (a word importing something future) at the house of Messrs. Birch and Co. It is not the money, but the draft, which is said to be paid immediately before the execution of the indenture. This distinguishes the present case from *Rumball v. Murray*, and *Berry v. Bentley*, for in those cases the consideration is stated to have been paid. The decision in *Morris v. Wall* is in favour of the defendants. If it were sufficient to state, that the grantee paid partly by money and partly by draft, (the time at which the draft is payable, not being mentioned,) a door would be opened to every species of imposition, as the draft might never be paid, or paid at such a distance of time that the discount might materially diminish the consideration agreed upon. The view, therefore, taken by the courts of this subject is correct. The other cases cited do not apply. In *Ex parte Maxwell* the consideration was stated to have been paid on the day of the date of the annuity-deed. *Ex parte Michell* only shows that if the consideration be paid in money before execution of the deeds, the annuity will be valid. As to *O'Callaghan v. Ingilby*, the sum was there stated to be paid in hand.

DALLAS, C. J. This is an objection which ought not to be encouraged. The grantor, at the distance of twelve years from the execution of the deed, at a period when all the witnesses who could have spoken to the transaction are dead, raises his objection for the first time. It is no answer to say, that the principal has been paid as well as the interest, for that may be the case with all annuities; they are granted upon the chance of life, and if the grantor had died within a year, the grantee would have lost all. As little weight is there in the

observation, that this was a transaction entered into with a person in early life; because upon every principle of honesty and justice he should be the less disposed to come here to set it aside. This case may be considered upon two grounds, on principle and on authority; and, as to the authorities, it is now too late to lament the turn which the cases have taken; for, so often have matters of this sort been decided, that even in the time of that eminent person who re-*23] gretted the result of the decisions, the law was settled as clearly *as it ever can be. Now with regard to the principle, it is objected here that the memorial does not state when the draft for 65*l.* was payable, or whether it was ever paid, so that it is uncertain whether the grantor of the annuity ever received the whole of the consideration for it. In principle there is a reason why it should appear upon the face of the memorial when the draft was payable, and that reason is given in *Berry v. Bentley*. "The objection was, that the memorial did not set forth when the note was payable, whether immediately or at a distant day; for if at a distant day, it was not worth 700*l.* by reason of the discount." Now the draft in this case might have been payable at a distant day, and the grantor might have lost so much of his consideration as the discount of the draft for the intermediate time might amount to. In substance, therefore, and on principle, here is a ground why the time at which a bill is payable should appear on the memorial.

This brings me to the cases which have been decided; but before I enter on them I will revert to the language of this memorial: it is, "that in pursuance of the said agreement, and in consideration of the sum of eighty-five pounds in notes of the governor and company of the Bank of England payable to bearer on demand, and also of the sum of sixty-five pounds by a draft bearing even date herewith, drawn by John Moore of No. 50 Great Marlborough Street, gentleman, on, and payable at Messrs. Birch, Chambers, and Hobbs, bankers, Bond Street, London," (without saying when) "to the said Thomas Rogers in his own person, (by and with the privity and consent of the said Benjamin Pullan, testified by his executing the said indenture,) well and truly paid by the said John Drake immediately before the execution of the said indenture, the receipt *24] whereof the said Thomas Rogers did thereby acknowledge,"—Now *what does he acknowledge? Not the receipt of the money, but of the draft. That leaves the objection where it was, namely, whether it is necessary on principle and on the decided cases, that the memorial should express the time when the draft is payable; and there are cases directly in point. First, *Berry v. Bentley*: then *Poole v. Cabanes*; and that case is much stronger than the present, for there it appeared on the memorial, that the draft was duly honoured; but the third objection taken was, that the consideration was not sufficiently stated in the memorial. Gibba produced an affidavit that the annuity had been regularly paid seven years; that the party who drew the draft was dead; and then insisted that this objection ought not to be made, when the only person, who could disprove it was dead: upon which the court were about to discharge the rule, when Lawes observed that the last objection appeared on the memorial itself, where it was stated that part of the money was paid by a banker's check, without setting forth the time when the check was payable, and referred to *Berry v. Bentley*. Gibba then said a banker's check was always considered as money, and that the payment in *Berry v. Bentley* was made by a promissory note. But the court thought that was immaterial, and the rule was made absolute; the defendants agreeing to return the principal on taking an account before the master. It appears to me from these two cases, and also upon principle, that it is necessary to state in the memorial at what time a bill or draft given as part of the consideration was payable. But, before coming to a decision, I will look into *O'Callaghan v. Ingilby*.

Cur. adv. vult.

The court on the next day made the rule absolute, but imposed on the defendant the condition of returning *the principal on taking an account before the prothonotary.

Rule absolute.

HALE v. SMALL and Others.

Held, that evidence of a dealing in hops was properly admitted in a cause brought to try the validity of a commission of bankrupt, describing the plaintiff as a dealer in cattle, seeking his trade of living by buying and selling.

A COMMISSION of bankrupt described the plaintiff as "Edward Hale, of West Worldham in the county of Southampton, dealer in cattle, using and exercising the trade of merchandise, by way of bargaining, exchange, bartering and chiviance, seeking his trade of living by buying and selling." The plaintiff, in order to try the validity of the commission, sued the defendants (assignees under the commission) in trespass for taking his goods. At the trial before Wood, B., (Winchester Spring assizes, 1820) evidence of a dealing in hops was tendered, to prove the trading of the plaintiff; the evidence was objected to, but admitted, and was the only evidence of a dealing. Verdict for the defendants. This was the third trial; the first verdict having been given for the defendants, the second for the plaintiff, and the last new trial having been granted on the ground that the plaintiff might have been taken by surprise, by evidence of a dealing in hops after being described in the commission, as a dealer in cattle.

Onslow, Serjt., had obtained a rule *nisi* to set aside this verdict, and have a new trial, on the ground, among other objections, that under the terms of this commission, the evidence tendered at the trial was improperly admitted.

**Pell*, Serjt., on showing cause, cited *Ex parte Herbert*, 2 Ves. & B. [*[26] 399, as in point, and contended, that it was not necessary to state in the commission any specific manner of dealing, but merely to pursue the words of the statute, which this commission had done, by describing the plaintiff as one who gained his living by buying and selling. There might be a convenience in giving the bankrupt notice, by specifying some trade; but he would be as little assisted by the common description of dealer and chapman, as by the mention of a trade which he did not exercise. A decision had been pronounced by the Lord Chancellor, in this very case, in which his lordship had refused to amend or set aside the commission.

Onslow, in support of his rule, urged, that the Lord Chancellor's decision in this case, only proved that he would not amend a commission, which in fact he never did, after it had been acted upon; but it did not follow that the commission was valid because the Chancellor would not amend it. It would be of mischievous consequence if a false description or no description of the party were given in the commission, and an extraordinary departure from the usual form.

Dallas, C. J. In this commission the plaintiff is thus described, "of West Worldham in the county of Southampton, dealer in cattle, using and exercising the trade of merchandise, by way of bargaining, exchange, bartering and chiviance, seeking his trade of living by buying and selling." He is described not only as a dealer in cattle, but as a person gaining his livelihood by buying and selling. It is necessary now to consider whether the expression "dealer in cattle," is descriptive of the bankrupt's person, or of his trade, and if it be descriptive of his trade, whether it may not be rejected as surplusage. It was contended, that evidence of a trading ought not to have been admitted [*[27] under such a description; and when this came before the court on a former occasion, they thought it might be a surprise upon the party, if the defendants were to set up evidence of a trading in hops, as the only trading on which the bankruptcy rested, after having described the plaintiff as a dealer in cattle. They did not go the length of saying, that the commission was therefore invalid, but thought grounds were laid for sending the case down to a new trial, lest there should have been any surprise on the plaintiff. I still think that it may be a source of inconvenience to describe a party as acting in one capacity, and then to offer evidence of his acting in another and a different capacity.

When the cause was sent down a second time for trial, all objection on the ground of surprise was removed; for it was known, that evidence would be set up to establish a dealing in hops; and the only question now is, whether the description of a dealer in cattle having been inserted, and the expression of dealer and chapman having been omitted, the statement that the party gained his living by buying and selling is sufficient. How then does the matter stand on reason and principle? what clearer information does the party receive from the expression dealer and chapman, than would be conveyed to him by the description used in the statute, (a) namely, a person gaining his livelihood by buying and selling. My brother Park expressed himself in these terms, when the question was last raised in this court. "The general statement that the bankrupt got his living by buying and selling, will admit the finding of any particular trading." (b) Here, if "the term *dealer and chapman*, or in the absence *28] of that, if the term *buying and selling* would entitle the defendants to prove any trading, then the question is, whether the naming a particular trade would operate to exclude such general proof. In *Ex parte Herbert*, the Lord Chancellor held, that the general allegation of buying and selling was sufficient to render the commission valid; and the only difference between that case and the present is, that there the question was, as to the sufficiency of the general words, here the question is as to the admissibility of general evidence under those words. It appears, to me, therefore, that the words *dealer in cattle* are descriptive of the person only, and as such not material, while the words *buying and selling*, as descriptive of a trader, are sufficient to render the commission valid, and to admit evidence to prove any act of trading.

BURROUGH, J. The language of the act is, "any merchant or other person using or exercising the trade of merchandise by way of bargaining, exchange, recharge, bartry, chevisance, or otherwise in gross or by retail, or seeking his or her trade of living by buying and selling." (c) The expression *dealer and chapman* does not exist in any of the acts touching bankrupts, and only found its way into commissions, to enable the parties to prove a general trading. But I am still of opinion, that some description of the person is necessary; "Esquire" would be sufficient, if *using trade by buying and selling* were added; but some description is necessary; and when that has been formally given, there is no objection to letting in evidence of any kind of trading. A man has been described as a waterman, in which capacity he was not subject to the bankrupt laws: but *29] that being merely descriptive of the person, the parties were allowed to go on and prove a trading. So here, though the plaintiff was personally described as a dealer in cattle, it was competent to the defendants under the general words to prove any species of trading. I think, therefore, the dealing in hops was properly admitted in evidence under this commission.

RICHARDSON, J. I am of the same opinion. When this was first before the court it was objected, that a dealing in hops could not be proved under this commission, and it struck the court that there were no commissions, in which the words *dealer and chapman* were not introduced; but they gave no opinion on the effect of the omission. Upon considering the subject it seems to them, that the general words here convey every information, and satisfy every point that *dealer and chapman* would. In common cases some particular trade is usually prefixed, as "silk mercer, dealer and chapman;" but it could not be doubted, that under such expression, evidence might be admitted to show that the party was a general merchant. I think, the same may be done here, under words which in meaning are equivalent to *dealer and chapman*, and more authorized by the language of the statute.

Rule discharged

(a) 13 Eliz. c. 7, s. 1.

(b) 3 B. Moore, 58.

(c) 13 Eliz. c. 7, s. 1.

*GRAY v. SHILLING.

[*30]

By the 2 G. 3, c. 67, (local act,) under which a turnpike gate was erected at L., the toll, when carriages passed, was imposed on the carriages, not on the horses drawing them; and persons having paid on passing, were, on their return the same day, exempt from toll. By the 49 G. 3, c. 28, (local act,) applying to the same turnpike, and reciting the former act, the old tolls were repealed, and the new toll, when carriages passed, was imposed, not on the carriages, but on the horses drawing them: In the latter act, all the provisions, regulations and clauses of the former were continued as fully as if they had been re-enacted: Held, that where the toll imposed by the latter act, had been paid for horses passing with a carriage, those horses were exempted from toll on returning the same day, though with a different carriage.

THE declaration stated, that a certain toll-gate, situate in the parish of Lamberhurst, in Kent, commonly called Lamberhurst Pound Gate, standing upon and across a certain public highway in the said parish, was gate erected by virtue of the stat. 2 G. 3, and that the plaintiff, after the passing of that act, and after the passing of the 49 G. 3, to wit, on, &c. at, &c., were lawfully possessed of four horses, which then and there drew a certain coach of the plaintiff, in and along the highway and through the toll-gate; and that for their so passing through the same, the plaintiff paid to the defendant, being the toll-gate keeper, appointed to collect the tolls at the said gate, the toll by him demanded and due in that behalf, by force of the statute, &c., and obtained and received from the defendant, so being such toll-gate keeper, a proper and sufficient ticket, denoting the due payment of such toll, and that afterwards and before 12 o'clock at night of the same day, the same horses were lawfully drawing another and different coach of the plaintiff's in and along the highway and near to the gate, for the purpose of passing through the same free of toll, and, for that purpose, the plaintiff then and there presented and showed the defendant the ticket, and demanded permission of the defendant, as such toll-gate keeper, to pass through the gate with the horses and the last mentioned coach free from toll, according to the statute, &c., yet, that the defendant would not suffer the horses, with the last mentioned coach, so to pass through the toll-gate free of toll, but wholly refused, and on the contrary thereof, falsely pretended that a toll of one shilling and fourpence was *due and payable to the defendant under and by virtue of the statute, and injuriously fastened the gate, and kept the same fastened for one hour, and thereby wrongfully stopped and detained the horses and last mentioned coach, and prevented the same from passing through, until the plaintiff paid to the defendant the sum of money so pretended to be due and payable as aforesaid, contrary, &c. By means whereof plaintiff was injured, &c.

General demurrer and joinder.

Taddy, Serjt., in support of the demurrer. The question is, whether under the 49 G. 3, c. 28, (a) horses, which *have passed through this gate, are [*32] exempt from toll on returning the same day. The 2d of Geo. 3, c. 67,

(a) By the 2 G. 3, c. 67, (local act,) it is enacted, that from and after the 1st of June, 1762, it shall be lawful to and for the trustees, &c. appointed to put that act in execution, &c. to demand and take the several tolls and duties thereafter mentioned, instead of the tolls and duties laid and made payable by the act of the 14th of his late Majesty, before any cattle or carriage whatsoever shall be permitted to pass through any bar, &c. to be erected by virtue of this act on any part of the roads leading from Kipping's Cross to Lamberhurst Pound, &c. viz.

For every coach, &c. (the tolls therein mentioned.)

For every wagon, &c. (the tolls therein mentioned.)

For every horse, &c. laden or unladen, and not drawing, (the toll therein mentioned.)

Provided, &c. that no person or persons having paid the tolls or duties hereby directed to be paid at any of the gates, &c. erected by virtue of this act, through which such person or persons shall pass with any horse, &c., and producing a ticket, &c. that such toll was paid, (which ticket, &c. the collector, &c. is hereby required upon demand to give,) shall be liable to pay again for returning ever so often through the same gate, &c. the same day, or before 12 of the clock at night, with the same horse, &c. But if any person or persons shall pass the same day through the said turnpike, a third time, with any carriage whatsoever (with wood for firing excepted,) then such person or persons shall be liable, &c. to pay the said toll or duty hereby imposed on such respective carriage, and to receive another ticket, &c. which shall entitle him or them to return through the same gate, with the same carriage, upon the same day, once more toll-free; and so, *toutes quoties*, for every third

(to which the 49th refers) where carriages pass, imposes the toll on carriages not on horses drawing them, and exempts persons from toll on their return the same day: the 49th imposes the toll, when carriages pass, on the horses drawing them, and orders that all the provisions of the 2d shall be re-enacted and continued. The question, therefore, is, whether the exemptions of the 2d are re-enacted in the 49th. Now there are some exemptions from toll specified in the 49th, but horses on their return are not mentioned among these exemptions, and where some exemptions are mentioned, others cannot be implied; the exemptions in the first act, therefore, only apply to the last, where they can stand without alteration; for they are continued, but not changed; and where a carriage passes, it is the carriage that is exempted by the old act, not the horses drawing it.

**Bosanquet*, Serjt., contra. The court will not impose a duty unless [33] there are the clearest grounds for doing so. By the 2d of Geo. 3, persons returning the same day, whether with horses or carriages, were exempt from toll. Though if the carriages passed a third time they were liable to a second toll. The new act lays the duty upon the horses, but re-enacts and continues the provisions of the old act. The carriage, therefore, forming no object of the provisions in the new act, the horses may be exempted on their return, by virtue of the clause in the old act exempting persons returning with horses. If any such alteration had been intended, as that carriages or horses returning the same day should pay a second time, it would have been mentioned. *Williams v. Sangar*, 10 East, 66, is in point.

Taddy, in reply. *Williams v. Sangar* was a case on a different act of parliament, and does not apply here. The exemptions of 2 Geo. 3, if re-enacted, do not include the present case.

DALLAS, C. J. In this case the party is clearly exempted from toll. The point is decided in *Williams v. Sangar*. There, the duty was imposed on carriages drawn by horses. The duty being laid on carriages, and a carriage returning the same day being exempt from toll, it was held that no toll could be exacted for a carriage returning the same day, though the carriage should return with different horses. That case, therefore, converting the objects of toll, is exactly applicable to the present. As to the clauses of exemption contained in the 2 Geo. 3, they are adopted and re-enacted by the 49 Geo. 3, unless expressly altered, and no alteration appears to have been contemplated by the legislature. *This would have been our decision if there were no previous [34] case, but *Williams v. Sangar* renders the matter perfectly clear.

BURROUGH, J. The old clauses must be taken to be re-enacted in such a manner as to be applicable to the same subject. It is clearly provided that persons shall not pay on their return.

RICHARDSON, J. The exemptions of the former act are applicable to the new subject matter. Under the former act horses returning were not liable; in the latter there is no toll on carriages. Judgment for the plaintiff.

time the said person or persons shall pass the same day through the same gate, &c. with the said carriage, as aforesaid.

By the 49 G. 3, c. 28, (local act, applying to the same turnpike, and reciting the former acts,) it is enacted, That all, &c. the tolls granted, &c. by the said recited acts to be taken on the said roads, shall from and after the second Monday next after the passing of this act, be, and the same are hereby repealed; and that, instead thereof, there shall be demanded and taken at all, &c. the gates, &c. erected, &c. by virtue of the said recited acts, or this act, the several tolls following, viz.

For every horse, &c. drawing any carriage, the sum of four pence.

For every horse, &c. laden or unladen, and not drawing, the sum of one penny.

And it is further enacted, That the said recited acts, and all and every the powers, authorities, provisions, regulations, penalties, forfeitures, clauses, matters and things, therein respectively contained, except such as relate to exemptions from stamp duties, and except such as are hereby varied, altered, or repealed, shall be, and they are hereby further continued for and during the term herein-after mentioned, as fully and effectually, to all intents and purposes, as if the same were repeated and re-enacted in the body of this act, but subject, nevertheless, to the amendments, alterations, variations, and additions, herein contained.

MORLEY v. LAW.

A misnomer of the plaintiff can only be taken advantage of by plea in abatement, and affords no ground for setting aside proceedings on motion.

Cross, Serjt., had obtained a rule to show cause why the *testatum capia ad respondendum*, issued against the defendant in this cause, and the several proceedings thereon, should not be set aside for irregularity, on the ground of a misnomer of the plaintiff. She had sued as Mary Morley, her name being Martha.

Vaughan, Serjt., who showed cause against the rule, insisted that this objection could only be made by plea in abatement.

Cross, in support of his rule, cited *Wilks v. Lorck*, 2 Taunt. 399, contending that a misnomer of the plaintiff was to be treated in the same manner as a misnomer of the defendant.

*But the court referring him to the *Clerk of the Trustees of Taunton Market v. Kimberley*, 2 Bl. R. 1120, and *Gardner v. Walker*, 3 Anstr. [**35 935, said that a misnomer of the plaintiff could only be taken advantage of by Discharged.

GRIMES v. JOSEPH, a Prisoner.

Where a prisoner, who had been charged with a declaration as of Trinity term, 1819, absconded during the long vacation, and did not return to custody till Hilary term, 1820, the court would not discharge him, though the plaintiff had not signed judgment by the end of Hilary term, 1820.

The defendant being in the custody of the warden of the Fleet, was charged with a declaration at the suit of the plaintiff, about the 22d of July last, as of the then preceding Trinity term. Shortly afterwards he caused himself to be removed from the prison of the Fleet, by a writ of *habeas corpus*, to the King's Bench prison, where he procured the rules, and about the 4th of October absconded to the continent, whence he did not return till Hilary term last. The plaintiff, not having signed judgment up to the last day of Hilary term,

Vaughan, Serjt., in this term, had obtained a rule to show cause why the defendant should not be discharged out of custody, as to the plaintiff in this action, the plaintiff not having proceeded to final judgment in due time.

Peake, Serjt., now showed cause against the rule, and contended that the plaintiff was entitled to two terms after the time of the defendant's return. If the plaintiff had proceeded in the action, he must have demanded a plea of the defendant, and served notices and rules on him, which, as the defendant was abroad, the plaintiff *could not do. Even if he had entered up final judgment, he could not charge an absent party in execution. [**36

Vaughan, Serjt., in support of his rule, urged that the notices and rules might have been left with the turnkey, and that the jailer was liable, if the prisoner was not ready to be charged in execution.

Sed per Curiam. The rule with respect to signing judgment within a certain time against prisoners, does not apply to such a case as the present; the object of the rule is to prevent unnecessary custody; here no custody was occasioned to the prisoner by the plaintiff's omitting to sign judgment.

Rule discharged.

LINGHAM v. WARREN and Others, Executors.

To an avowry by executors for rent due in the testator's life, it is no plea "That the testator levied a sufficient distress for the same rent," unless it be also averred that the rent was thereby satisfied.

DECLARATION in replevin for taking goods in a dwelling-house, avowry that the plaintiff held the dwelling-house in which, &c. as tenant to the testator in

his life-time, and from his death until the time when, &c., as tenants to the defendants as executors, by virtue of a demise to the plaintiff made in the life time of the testator, under a yearly rent, payable quarterly; and because a year's rent was due from the plaintiff to the testator in his life-time, and from the time of the death of the testator to the time when, &c. was due to the defendants as executors, the defendants well avow, &c.

Plea in bar, that the defendants ought not to avow; because the testator, in his life-time, took and distrained, as a distress for the same identical rent in the *37] avowry mentioned, divers goods and chattels of the plaintiff of sufficient value to satisfy and discharge the rent in the avowry mentioned, and therein supposed to be due, and in arrear, and unpaid to the defendants as executors, and the costs of taking and keeping the said distress, (to wit,) at, &c.; and this the plaintiff was ready to verify, &c.

Demurrer and joinder.

Vaughan, Serjt., in support of the demurrer. The mere circumstance of the testator's having taken a sufficient distress is no answer to the avowry for rent arrear, unless by that distress the amount of the rent was actually recovered. That does not appear on this plea; and many cases may be conceived in which the rent may not have been recovered, although a sufficient distress may have been taken; as where the distress has been replevied, and by the death of the party the suit has abated. *Lear v. Edmonds*, 1 B. & A. 157, is in point.

Lawes, Serjt., contrà. *Lear v. Edmonds* was the case of an action for use and occupation; and it was no answer to a demand for money, to say that a distress had been taken, without saying also that the money had been recovered. But the question here is, whether the landlord, having taken one distress, can proceed to take another; whether, even if the debt be not satisfied by the first distress, he is not driven to some other remedy instead of making a second distress. Here it is averred, that the first distress was sufficient; and where that is the case, the landlord cannot make a second. Before the 17 Car. 2, c. 7, s. 4, he could not make a second, even where the first was insufficient.

Dallas, C. J. This case, in principle, is not to be distinguished from *Lear v. Edmonds*. There are many *cases supposable, in which the taking a sufficient distress might not produce a satisfaction of the rent.

Judgment for the avowants.

HOLLIS SOLLY and SAMUEL SOLLY v. JOHN MURRAY FORBES and ABRAHAM FREDERIC DANIEL ELLERMAN.

A release was given by plaintiffs to A., one of two partners, with a provision that it should not prejudice any claims which plaintiffs might have against B., the other partner; and that, in order to enforce the claims against B., it should be lawful for plaintiffs to sue A., either jointly with B. or separately. In an action by plaintiffs against A. and B. this release having been pleaded by A. and set out on oyer in the replication, with an averment that the action was prosecuted against A. jointly with B., for the purpose of enabling plaintiffs to recover payment of moneys due from B. and A. to plaintiffs, either out of the joint estate of B. and A., or from B. or his separate estate, the replication was demurred to, and the demurral overruled.

DECLARATION for money paid by the plaintiffs to the use of defendants, for money lent, for money had and received by the defendants to the use of the plaintiffs, for work done and labour performed by the plaintiffs as agents to defendants, for interest upon moneys lent by the plaintiffs to the defendants, and upon an account stated between the defendants and the plaintiffs.

Pleas: by Forbes, general issue; *Similiter* thereon. By Ellerman, general issue, a release, and a set-off. The replication craved oyer of the supposed release which was set forth verbatim, and which was in substance an indenture dated 20th May, 1819, between the plaintiffs, both of the city of London, merchants and co-partners in trade of the one part, and Abraham Frederick Daniel

Ellerman, late of Hamburg, merchant, but then residing and carrying on trade in Heligoland, of the other part, by which indenture (after reciting that, up to the year 1806, Ellerman carried on the trade or business of a merchant at Hamburg, and also at Toningen, in partnership with John Murray Forbes under the firm, at each of the last-mentioned places, of Forbes and Ellerman, and that there were various transactions of business between *Forbes and Ellerman, and the plaintiffs; and that in or about the month of March, 1806, [*39 Forbes and Ellerman, having become embarrassed in their affairs, stopped payment, and that upon the balance of accounts between Forbes and Ellerman and the plaintiffs, Forbes and Ellerman stood justly indebted unto the plaintiffs, as co-partners in trade, in a considerable sum of money, the whole of which debt still remained unpaid and was then due and owing from Forbes and Ellerman to the plaintiffs; and that Ellerman had lately offered and proposed to the plaintiffs to pay to them in the manner hereinafter mentioned the sum of 3000 $\text{l}.$, if the plaintiffs would give and execute unto Ellerman such release or discharge for or in respect of their aforesaid debt or demand on Forbes and Ellerman as hereinafter was contained;) it was witnessed, that in consideration of 600 $\text{l}.$ to the plaintiffs in hand paid by Ellerman immediately before the execution of those presents, the receipt whereof the plaintiffs did thereby jointly and severally acknowledge, and also in consideration of twenty-four promissory notes of Ellerman, each for 100 $\text{l}.$ and each bearing date the 1st April, 1809, and which twenty-four promissory notes were made payable to the plaintiffs or their order successively, at one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four months' date, (each of the said notes being numbered, and the number of each note corresponding with the number of months it had to run,) the receipt of which said twenty-four promissory notes (amounting together with the said sum of 600 $\text{l}.$ to the before mentioned sum of 3000 $\text{l}.$ so agreed to be paid to and accepted by the plaintiffs) the plaintiffs did also thereby acknowledge; and pursuant to, and in execution of the agreement thereinbefore recited on the part of the plaintiffs, the plaintiffs had, and each of them had, remised, released, *and for ever discharged, and by [*40 those presents did and each of them did, remise, release, and for ever discharge Ellerman, his executors, administrators, and assigns, of, from, and against all and all manner of actions and suits, cause and causes of action or suit, debt, sum and sums of money, accounts, bonds, bills, notes, contracts, agreements, promises, damages, claims and demands whatever, in law and in equity, which the plaintiffs then had, or which they, or either of them, their, or either of their executors, administrators, or assigns, thereafter could, should, or might have against Ellerman, his executors, administrators, or assigns, for or by reason of any matter, cause, or thing whatsoever, relating to the premises, from the beginning of the world, to the day of the date of those presents, except, and subject nevertheless to the provisos, declarations or agreements hereinafter contained. Provided always nevertheless, and it was thereby agreed and declared by and between the parties to those presents, and the true intent and meaning of them, and of those presents was, that those presents or any matter or thing therein contained should not release, or be construed and taken to release, or in any manner to prejudice and affect any claims or demands which the plaintiffs, or either of them, ever had, or then had, or which they, or either of them, or either of their executors, or administrators, thereafter could, should, or might have upon or against Forbes, either separately, or as a partner with Ellerman, or the executors, administrators, or assigns of Forbes, or upon or against the joint estate or effects of Forbes and Ellerman in respect of the debt so due from Forbes and Ellerman to the plaintiffs, or any part of such joint estate, or effects, whether the same should be in the hands of or recoverable from Forbes and Ellerman, or either of them, or any other person or persons whom-

*41] soever. Provided also, nevertheless, and it was *thereby declared and agreed by and between the parties to those presents, and the true intent and meaning of them, and of those presents was, that it should and might be lawful to and for the plaintiffs, their executors, administrators or assigns from time to time, when and as they, the plaintiffs, their executors, administrators, or assigns, should be thereto advised, to commence and prosecute any actions, suits, or other proceedings, either at law or in equity, against Ellerman jointly with Forbes, or against Ellerman, his executors, administrators, and assigns, separately, for the purpose of recovering, or compelling or of enabling the plaintiffs, their executors, administrators or assigns, to recover or compel payment, or satisfaction of the debt, so due and owing from Forbes and Ellerman, to the plaintiffs as aforesaid, either by or out of any the joint estate or effects of Forbes and Ellerman, or by or from Forbes, his executors, administrators, or assigns, or his separate estate or effects. Provided always nevertheless, and it was thereby lastly declared and agreed by and between the parties to those presents, and the true intent and meaning of them and of those presents was, that in case default should be made in the due payment of any two of the before mentioned promissory notes, successively to fall due, in such manner as that any two of the promissory notes should be due and unpaid at the same time, then and in such case those presents, and every matter and thing therein contained should, from and immediately after such default, be absolutely void and of no effect, and the said sum of 600*l.*, and all or any other sums or sum of money, which might at that time have been paid, and also all or any other sums or sum of money which might at any time or times from and after such default, be paid, in discharge of any of the aforesaid promissory notes, should be carried to the credit of Forbes and Ellerman with the plaintiffs, and all the

42*] *rights, claims and demands of the plaintiffs, their executors, administrators or assigns by reason or in respect of the debt thereinbefore mentioned to be due to them from Forbes and Ellerman, either upon or against Forbes and Ellerman, jointly or separately, their or either of their executors, administrators or assigns, or any other persons or parties whomsoever, should from and immediately after such default be in full force and virtue (as to so much of the debt so due to the plaintiffs as aforesaid, as should remain unpaid,) in like manner, to all intents, effects, constructions, and purposes, as if those presents had never been made, any thing therein contained to the contrary thereof in any wise, notwithstanding. In witness whereof, &c. A memorandum, of which the following is the substance, was then added: "This deed is deposited by S. Solly and H. Solly (the plaintiffs) and by G. B. on the part of Ellerman with E. L., who is to deliver it to Ellerman, his executors or administrators, or his or their order, after due payment of the within mentioned twenty-four promissory notes, according to the tenor and meaning of the within written indenture, but in case of any default in payment of the promissory notes, or any of them, according to the tenor and meaning of the within written indenture, E. L. is to deliver up the indenture to S. Solly and H. Solly, their executors or administrators, to be cancelled, and in the mean time the indenture is to remain in the hands of E. L. for the purposes aforesaid."—The replication then concluded thus: "Which being read and heard, the plaintiffs say that by reason of any thing by the defendant Ellerman in his plea alleged they ought not to be barred from having their aforesaid action thereof against him, because they say that Forbes, with whom the defendant Ellerman is jointly sued in this action, and the *same person, and not other or different persons, and that the said

43*] Forbes is so sued as aforesaid, as a partner with the said Ellerman in respect of a certain part of the moneys, in the said supposed writing of release mentioned to be due and owing from the said Forbes and the said Ellerman to the plaintiffs, to wit, at, &c. And the plaintiffs further say, that this action is

prosecuted against the said Ellerman jointly with Forbes for the purpose of recovering or compelling, or of enabling the plaintiffs to recover or compel payment or satisfaction of the moneys so due and owing from the said Forbes and the said Ellerman to the plaintiffs as aforesaid, either by or out of the joint estate or effects of the said Forbes and the said Ellerman, or by or from the said Forbes, or his separate estate or effects, to wit, at, &c. And this, &c. Wherefore, &c." As to the set-off the plaintiff replied that they were not indebted to the defendant Ellerman in manner and form alleged, and as to that, put themselves on the country. *Similiter* thereon.

Demurrer, and joinder in demurrer.

Blosset, Serjt., in support of the demurrer. First, the proviso in this release are void, as being repugnant to the nature of the instrument. Secondly, the release cannot at any rate be taken advantage of in this manner, and the mode of pleading it here, is a departure from the declaration. Thirdly, no issue can be joined on the latter part of the replication, as it only avers what was the party's purpose.

On the first point the general principle is laid down by the Lord Chancellor in *Bradly v. Peixoto*, 3 Ves. Jun. 325. "Where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is void;" and a reference is there made to many cases in 2 Danvers' Abr. 22. To the same effect is *Moore and Savil's case*, 2 Leon. 182, and in the judgment of the court in *Stukely v. Butler*, the principle of the rule is deeply considered. "A condition annexed to an estate given, is a divided clause from the grant, and therefore cannot frustrate the grant precedent, neither in any thing expressed, nor in any thing implied, which is of his nature incident and inseparable from the thing granted." Hob. 170. In Roll's Abr. 419, l. 25, and 418, l. 25, the same doctrine is laid down. From all which, it appears that if a proviso be inconsistent, either with the nature of the deed as expressed on the face of it, or as it is to be implied from the legal effect of the instrument, the condition is void.

Secondly, this is a departure. The declaration charges the two defendants, and the replication seeks to charge only one. The defendants were obliged to plead the release, for if they had not pleaded it,—if they had pleaded the general issue,—both would have been liable to judgment and execution. Equity would not have relieved, but would have said that the parties might have pleaded the release at law: and now in consequence of this plea, the plaintiffs go for a claim very different from that set up by the declaration.

Thirdly, no issue can be joined on the replication, as it states only what was the purpose of the party: a man's intent cannot be put in issue. 1 Ld. Raym. 261, *Per Curiam*, in *Rex v. Graham; Booth's case*, 5 Rep. 77, 3d Resol.

Bosanquet, Serjt., contrâ. Though this deed is inartificially drawn, yet looking to the whole of it, the court will put that construction upon it which will best effectuate the intention of the parties. This, though a release in form, is, in substance, a covenant not to sue. There is no reason therefore to impeach any of the authorities cited on the other side. If a conveyance of an estate be made, which must be a conveyance or nothing, and there is an exception which defeats the estate, the exception is void. But if the deed can operate two ways, one consistently with the exception, the other not, the court will be even astute to make the deed operate in conformity with the exception. This is the language of Lord Hobart.(a) So, *Crossing v. Scudamore*, 1 Vent. 141, *Doe dem. Wilkinson v. Tranmer*, 2 Wils. 75, Bac. Abr. tit. *Release*, A. 2, 1 Show, 154, 5, *Payler v. Homersharn*, 4 M. & S. 423, *Goodtitle dem. Edwards v. Bayley*, Cowper, 597, Shepherd's Touchstone, 82, are all authorities to show that deeds will, where it is possible, be so con-

(a) Hob. 277, *Earl of Clanrickard's case*.

strued as to effectuate the intention of the parties. The present suit is quite consistent with the provisos, for Ellerman is sued jointly with Forbes on a joint debt: Ellerman is only joined for conformity, and if he or his property be taken in execution, he has his remedy by an action for damages on this deed, taking it as a covenant not to sue.

This is no departure; Ellerman being joined only for conformity, as appears by the very deed set out in the replication, the object of the replication is in substance the same as that of the declaration.

As to the third point; there are cases in which the intention must be put in issue; as in an action against a party discharged under an insolvent act; if he pleads his discharge, the plaintiffs must reply an intention to proceed against the effects, and not the person.

Blosset, in reply. There is no analogy between the insolvent debtor's case and the present. The plaintiff takes his judgment in conformity with the terms *46] of the *debtor's discharge; but such a replication as this was never heard of. With respect to the construction of the deed, it never was meant to leave Ellerman to his action of covenant. (DALLAS, C. J., nor was it meant to leave the plaintiffs without a remedy.)

The plaintiffs have a remedy in equity, but the defendants have none. Could it be in the contemplation of Ellerman that judgment and execution should go against him, and that he should be left to sue in covenant a person, who might have no effects to answer him in damages? The authorities in Bacon's Abridgment go to show, that a covenant not to sue may enure as a release; but this is very different from the position that a release may enure as a covenant not to sue, and the judgment of the court in *Hutton v. Eyre*, 6 Taunt. 289, S. C. 1 Marsh. 603, turns on the former ground. The question really before the court is beside the cases cited by the plaintiffs. Can the parties fetter the legal operation of a release upon the very matter on which the release is to operate? The subject matter on which the deed is to operate may be narrowed or divided, but the mode of operation cannot be changed. A party who enters into a deed is presumed to do so with a full knowledge of all its effects.

As to the departure, the declaration is in the usual form, and it no where appears that Ellerman was joined merely for conformity, so that upon the face of the pleadings, the demand in the replication differs from that in the declaration.

Cur. adv. vult.

DALLAS, C. J., now delivered the judgment of the court. The circumstances, under which this case comes before the court will appear by referring to the pleadings at large. The general question which arises is, whether the release as set forth constituted a bar to the *action. Of the intention of *47] the parties no doubt can be entertained. It was meant to release Ellerman as to person and effects, but not Forbes; and, therefore, to retain against Ellerman every right and remedy necessary to enforce payment from Forbes. But so to construe the release as to make it a release of both, which it would be if no action could be brought against Forbes, because Ellerman could not be joined, would make it operate not to effectuate but to defeat the intent of the parties. As little doubt can exist upon the words made use of to effectuate the intent, as upon the intent itself. It is not an absolute and unqualified release, but in terms conditional and provisional, being made subject to an exception; such exception forming part of the same sentence with the words of release, and immediately connecting with and attaching upon them, and introductory to and followed up by a proviso, by which it is expressly declared, that nothing contained in the deed of release shall be taken to release, or in any way prejudice or affect any demands of the plaintiffs, either against the said John Murray Forbes separately, or as a partner with Ellerman.—Now it would be to release and in every way to affect the demand against Forbes as partner with

Ellerman, to give such operation to the release as in effect to make it a release to both, by making it a bar to an action, in which for the recovery of a joint debt both must be jointly sued. Nor does this even rest on negative though necessary construction, for, in a subsequent part of the deed, it is expressly provided and declared to be the true intent and meaning of the release, that it shall be lawful for the plaintiffs to commence and prosecute any action against the said Abraham Frederick Daniel Ellerman jointly with the said John Murray Forbes for the recovery of the joint debt due from them; and this is a joint action for the recovery of such debt, being, therefore, an action expressly and in direct terms authorized by the deed of release itself. *But against this, objections of a technical and artificial nature have been raised, and we have [*48 been referred to many cases, in which it has been held, that a saving or condition repugnant to the nature of the grant is void, and that the grant remains absolute and unqualified, the condition no way operating in restraint of the grant.—It is not necessary to pursue these cases into their detail:—they are all cases of notoriety, the law of which is not to be disputed, and the only question is upon their application. But with respect to them all I would observe, that in one of the cases cited at the bar it was correctly stated, that the rule of construction in modern times has been more equitable than formerly; courts looking rather to the intention of the parties than to the strict letter; not suffering the latter to defeat the former, but in certain cases of exception to which it is not now necessary to refer.—Taking these cases, however, such as they are, the application sought to be established is altogether fallacious.—It is assumed, that, wherever the word release is made use of, it must operate absolutely and unconditionally, though immediately and in the same sentence followed by words, which show it to be partial and particular only, and the general words being in no respect repugnant to the special words, but the latter a qualification merely of the former, leaving the release to operate to every purpose except to the exclusion of the particular purpose, which the parties have declared it to be their intention it shall not exclude. This being apparent, both in terms and meaning, what are the rules of law which apply, narrowing them to the particular point? I pass over the general and leading principle, that the intent of the parties shall prevail as far as by law it may; and further, that courts will be anxious so to construe the law as to give effect to that intent, provided it do not contravene any fundamental rules of the policy of the law. If a deed can, therefore, operate two ways, one consistent with the intent and *the other [*49 repugnant to it, courts will be ever astute so to construe it as to give effect to the intent; and the construction, I need not add, must be made on the entire deed.—The passage cited at the bar is to this effect material.—“I exceedingly commend the judges (said Lord Hobart) that are curious and almost subtle to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act;”(a) and it has been correctly added, that in the case of *Crossing v. Scudamore*, Lord Hale cites and approves of the passage in Hobart, which is again referred to by WILLES, C. J., in the case in 2 Wilson, and is cited to be approved of and to be governed by in many other cases. Not to go through all the authorities which are to be found, it will be sufficient to select one or two only, and these will refer to the rest. In *Morris v. Wilford*, 2 Show. 47, it was expressly decided “that a release shall be construed according to the particular purpose for which it was made.” JONES, WYLD, and TWISDEN, justices, were of opinion on the first argument, that the release is no bar notwithstanding the general words; for being made for particular purposes, the general words are to be guided by the particular purposes. RAINSFORD,

(a) Hob. 277 *Earl of Clanrickard's case.*

C. J., contra. The case was argued a third time, when by the whole court judgment was given for the plaintiff.—In *Payler and Others v. Homersham*, 4 M. & S. 423, Lord ELLENBOROUGH adopts the position, that the general words of a release may be restrained by the particular recital. “Common sense (said his lordship) requires that it should be so, and in order to construe any instrument truly, you must have regard to all parts, and especially to the particular words of it.” The case in *Rolle to this effect, though said to have been denied by Lord HOLT to be law, “seems to me (said Lord ELLENBOROUGH) as sound a case as can be stated.”—And Mr. Justice BAYLEY adds, “there is no doubt but a particular recital in a deed will restrain the general words.”

On all these grounds, therefore, the apparent intent of the parties, sufficient words to effectuate that intent, the special nature of the release as formed by the very language in which the release itself is created, the matter, upon which it is to operate, and the known and established rules of construction to be collected from the authorities referred to, we are of opinion that this demurrer ought to be overruled. And in conclusion I will only say, that it is not intended to interfere with any received principles or established cases, but to decide only on this particular case with reference to its special nature, calling in aid former authorities only in the manner in which it has been endeavoured to apply them.—But, for further caution, I will add, the decision of the court only is, that the demurrer be overruled. It is not necessary now to say any thing as to any ulterior remedy the defendant may have or suppose himself to have:—In this respect he will act as he may be advised, and as circumstances may seem to require.

Demurrer overruled accordingly.

*BOLTON v. EYLES.

The court refused to set aside as irregular a bill filed against the warden of the Fleet, on the day after the essoign day of Easter term, entitled as of Easter term, and accompanied with a notice to plead in four days, the plaintiff not having signed judgment within eleven days after the filing of the bill.

A BILL was filed against the defendant, warden of the Fleet, on the 17th of April, the day after the essoign day of this term. The bill was entitled as of this term: four days' notice was given to plead, but judgment was not signed within eleven days after filing the bill.

Blosset, Serjt., had obtained a rule *nisi* to set aside all the proceedings, with costs, for irregularity. By the old practice a bill could not be filed against the warden in vacation, *Crook v. Eyles*, 6 Taunt. 347, S. C. 2 Marsh. 49, *Stock and Others v. Eyles*, 6 Taunt. 352, because it was his privilege to be called and answer in court, which he could only do in term time; and when a declaration was filed against him in term, he was allowed eleven days to plead, under 8 & 9 W. 3, c. 27, s. 12. By the 59 G. 3, c. 64, parties were enabled to file a bill against the warden in vacation, but in such a case were bound to entitle it as of the preceding term. Taking the essoign day as the first day of term, the plaintiff was irregular, in not having given an eight day rule to plead, upon which the warden was entitled to three more days, by the 8 & 9 W. 3, c. 27. Taking the essoign day as part of the vacation, the bill was irregular, in not being entitled as of the preceding term.

Vaughan, Serjt., in showing cause, contended, that the essoign day being the first day of term, the bill was properly entitled, and that the provisions of the statute 8 & 9 W. 3, were sufficiently pursued, if no judgment was signed against the warden within the eleven days allowed him to plead. The merely giving him notice *to plead in four days, (unless followed up by a judgment for want of a plea,) was wholly immaterial.

Blosset was heard in support of his rule.

Cur. adv. null.

DALLAS, C. J., now delivered the judgment of the court. The objection to the proceedings in this case is, that the plaintiff has filed his bill against the warden after the essoign day of this term, and before what is ordinarily called the first day of the term. It was contended, that, under the statute of 8 & 9 W. 3, c. 27, s. 12, a bill must be filed against the warden in term. In support of this proposition, the cases of *Crook v. Eyles*, 6 Taunt. 347, and *Stock and Others v. Eyles*, 6 Taunt. 352, in the same book, were cited. It was admitted, that under a late act of parliament, of the 59 Geo. 3, c. 64, a bill may be filed against the warden in the vacation. In the cases in 6 Taunt. this court held, that on the construction of the statute of 8 & 9 W. 3, a bill could not be filed against the warden, in the vacation, because it is enacted by that statute, that it shall be lawful for any person having cause of action against the warden, upon a bill filed against him in this court or in the Exchequer, and a rule being given to plead thereto to be out eight days at most, after filing such bill, to sign judgment against him, unless he plead within three days after the rule is out; and the court holding that a rule to plead could only be given in term time, when the court was actually sitting, decided that the actions could only be commenced in full term. This being found to be attended with inconvenience, the parliament thought it expedient, that the law and practice should be altered; and therefore, "by the 59 Geo. 3, c. 64, intituled "an act to facilitate proceedings against the warden of the fleet in vacation," after reciting, that by the practice of the Courts of Common Pleas and Exchequer, and by reason of the former act, no proceedings can be commenced in the time of the vacation against the warden, for or in respect of the escape of any prisoner or prisoners from or out of his custody, it is enacted, that persons having causes of action against the warden, for or in respect of any escape, may commence their action by filing a bill against the warden at any time in vacation, and entitle it of the preceding term; a copy of which, within twenty-four hours after filing, is to be delivered to the warden or his deputy, and the warden is to appear and plead within the first four days of the next term, or judgment shall be signed against him.

It is now contended, that, admitting by the last act a bill may be filed against the warden in time of vacation, and by the former act in term time, yet, that a party having cause of action against the warden for an escape in the interval between the essoign day and the term, cannot, during that interval, file his bill. If that be so, then that interval must be deemed no part of the vacation, or of the term. We are of opinion that the law warrants no such conclusion. We think we are bound to put such a construction on those statutes (and particularly on the statute of 8 & 9 W. 3, on which this question arises) as will tend to prevent many serious inconveniences, which would otherwise arise, and to advance the remedy of the suitor. In contemplation of law the essoign day is the first day of the term. In the case of *Standford v. Cooper*, Cro. Car. 102, it was holden, that a judgment has relation to the essoign day of the term, for (as the court says) it is in law the first day of the term, "and all legal acts have relation thereto. This case was recognised by the Court of King's Bench in the case of *Lord Portchester v. Petrie*, in Hilary term, 1783. We think the interval between the essoign day and the day of the court's actually sitting must be taken to be part of the term. But it is said, that if it be so, still the bill cannot be filed, because by the practice it is necessary that the warden should be called in court before the bill is filed. That which is mere form, and rendered impossible by the court's not actually sitting during this interval, ought not, we think, to prevent the plaintiff from commencing his suit, nor ought, in our judgment, the impossibility of his giving a rule to plead before the sitting of the court to have that effect. We think that a plaintiff may file his bill after the essoign day, and that if he gives a rule to plead on the first day of the term that is the first day the court actually sits, he will substantially comply with the requisition of the statute of the 8 & 9 W. 3. The rule which has been ob-

ained by the defendant, has prevented the plaintiff from doing this in the present case.

The rule must be discharged, and the defendant must appear and plead in four days.

Rule discharged accordingly.

BUCKLAND v. BUTTERFIELD and Another.

A conservatory erected by a tenant for years (who had a remainder for life, after the death of his lessor) on a brick foundation, attached to a dwelling-house, and communicating with it by windows opening into the conservatory and a flue passing into the parlour chimney, becomes part of the freehold, and cannot be removed by the tenant or his assignees.

Action on the case, in the nature of waste, by tenant for life, aged 70, against the assignees of her lessee from year to year, who had become *bankrupt.
[§ 55] The bankrupt was the son of the plaintiff, and had also a remainder for life in the premises after her death. At Buckingham Lent assizes, 1820, before GRAHAM, B., the case proved was, that the defendants had taken away from the premises let to the bankrupt a conservatory and a pinery. The conservatory, which had been purchased by the bankrupt and brought from a distance, was by him erected on a brick foundation fifteen inches deep: upon that was bedded a sill, over which was frame work covered with slate; the frame work was eight or nine feet high at the end, and about two in front. This conservatory was attached to the dwelling-house by eight cantilivers let nine inches into the wall, which cantilivers supported the rafters of the conservatory. Resting on the cantilivers was a balcony with iron rails. The conservatory was constructed with sliding glasses, paved with Portland stone, and connected with the parlour chimney by a flue. Two windows were opened from the dwelling-house into the conservatory, one out of the dining-room, another out of the library. A folding door was also opened into the balcony; so that when the conservatory was pulled down, that side of the house, to which it had been attached, became exposed to the weather. Surveyors who were called, stated that the house was worth 50*l.* a year less after the conservatory and pinery had been removed. The learned judge having stated his opinion that the plaintiff ought to recover at least for the pinery and probably for the conservatory, the jury, estimating the plaintiff's life at six years' purchase, gave a verdict for her, 200*l.* damages.

Peake, Serjt., having obtained a rule *nisi* for a new trial, on the ground that this conservatory, though affixed to the freehold, was a matter of ornament, not beneficial to the premises, but lawfully removable by *the tenant, and [§ 56] at all events the damages were excessive.

Blosset, Serjt., showed cause against the rule. This conservatory was not only affixed to the freehold, but actually formed a part of the dwelling-house. doors of communication having been made out of the sitting room, so that, when the conservatory was pulled down, the adjoining part of the house was rendered uninhabitable, being entirely exposed to the inclemency of the atmosphere. In all the cases, not excepting those that relate to the removal of ornamental constructions or additions, it has been considered, among other things, whether the tenant placed them on the premises with a view to removal, or no. Here, the party, though tenant from year to year, was entitled to the reversion after the death of his mother, to whom he was tenant, and he would never have made so costly an addition to his house as tenant from year to year, unless with a view to improve his reversionary interest. The damages, if estimated according to the tables set forth for life insurances by act of parliament, are perfectly fair; the plaintiff's life being worth six years' purchase, and the damage done having deteriorated her property to the amount of 50*l.* a year.

Prake, in support of his rule. The conservatory was an erection merely for

the purpose of ornament or pleasure; it neither formed part of the habitation nor rendered it more convenient. So far from being certainly beneficial to the property or necessary to its occupation, it might render it of less value in the eyes of a succeeding tenant, as an expensive and useless incumbrance. Whatever the law may be, with respect to parties who stand in other relations to each other, yet as between landlord and tenant, the tenant has a right to remove all ornamental erections which do not improve *the property for the purposes of occupation. *Beck v. Rebow*, 1 P: Wms. 94, *Ex parte Quincy*, [57] 1 Atk. 477, *Lawton v. Lawton*, 3 Atk. 13, and *Elwes v. Mawe*, 3 East, 3. In this latter case Lord ELLENBOROUGH considers all the decisions on the subject, and recognises the right of the tenant to remove things put up merely for ornament. In *Penton v. Robart*, 2 East, 88; a greenhouse erected by a market gardener, was, by Lord KENYON, held to be removable. The mere fixation of a thing to the freehold cannot be the criterion by which we are to determine whether it is removable or not; for every large picture, chimney piece, or wainscot, must be in some manner so affixed. If the wall of the house has sustained an injury by the removal of the conservatory, that indeed may be the subject of action, the damages in which should be commensurate to the injury done to the house and to the money requisite to restore it to its original state, but ought not (as in the present case) to be calculated by the supposed diminution of annual value on account of the loss of that, which the tenant had a right to remove.

Cur. adv. vult.

DALLAS, C. J., now delivered the judgment of the court. This was an action on the case, tried before GRAHAM, B., at the last Aylesbury assizes. The question in the cause, as far as relates to the motion now before us, was, whether a conservatory affixed to the house in the manner specified in the report was so affixed as to be an annexation to the freehold and to make the removal of it waste? In *Elwes v. Mawe*, will be found at length all that can relate to this case and to all cases of a similar description.—It is not necessary to go into the distinctions there pointed out as they relate to different classes of persons, or to the subject-matter itself of the *inquiry. Nothing will, here, depend on the relation in which the parties stood to each other, or the distinction between trade and agriculture; for this is merely the case of an ornamental building constructed by the party for his pleasure, and the question of annexation arises on the facts reported to us; and I say the facts reported, because every case of this sort must depend on its special and peculiar circumstances. On the one hand it is clear, that many things of an ornamental nature may be in a degree affixed, and yet, during the term, may be removed; and, on the other hand, it is equally clear, that there may be that sort of fixing or annexation, which, though the building or thing annexed may have been merely for ornament, will yet make the removal of it waste. The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste.—In the progress of time this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favour of matters of ornament, as ornamental chimney pieces, pier glasses, hangings, wainscot fixed only by screws, and the like. Of all these it is to be observed, that they are exceptions only, and, therefore, though to be fairly considered, not to be extended; and with respect to one subject in particular, namely, wainscots, Lord HARDWICKS treats it as a very strong case.—Passing over all that relates to trade and agriculture as not connecting with the present subject, it will be only necessary to advert, as bearing upon it, to the doctrine of Lord KENYON in 2 East, 88, referred to at the bar.—The case itself was that of a building for the purpose of trade, and standing, therefore, upon a different ground from the present, but it has been cited for the dictum of Lord KENYON, which seems to treat green-houses and hot-houses erected by great gardeners and nursery-men as not to be considered as annexed to the freehold.

*59] Even if the law were so, which *it is not necessary to examine, still, for obvious reasons, such a case would not be similar to the present; but in *Elwes v. Mawe*, speaking of this dictum, Lord ELLENBOROUGH says, there exists no decided case, and, I believe, no recognised opinion or practice on either side of Westminster Hall to warrant such an extension.—Allowing, then, that matters of ornament may or may not be removeable, and that whether they are so or not must depend on the particular case, we are of opinion that no case has extended the right to remove nearly so far as it would be extended if such right were to be established in the present instance under the facts of the report, to which it will be sufficient to refer; and, therefore, we agree with the learned judge, in thinking that the building in question must be considered as annexed to the freehold, and the removal of it consequently waste. Rule discharged.

SPRAGG v. HAMMOND.

In 1814, a distress was made on a tenant for the whole of the rent due from him, and a deduction for land-tax was refused, the lease being silent as to the land-tax; the tenant having protested against his liability, paid, during five succeeding years, the land-tax, without renewing in any sort the objection of his non-liability to pay: Held, that in 1820 he could not recover, in an action for money paid to the defendant's use, any of the sums so paid for land-tax.

This case, as stated by DALLAS, C. J., in delivering the judgment of the court, was as follows:

This was an action brought to receive the sum of 48*l. 5s. 1d.*, as so much paid by the plaintiff to the defendant's use.—The facts of the case, shortly stated, were these—The plaintiff held certain premises under a lease from the defendant, the lease being silent as to the payment of the land tax.—In 1814 *60] the defendant *distrainted, and at that time insisted on the payment of the rent in arrear, refusing to let the land-tax be deducted; and accordingly received his rent in full, alleging, that he had nothing to do with the tax in question.—The plaintiff about this time, or shortly after (viz. on the 13th December, 1814,) applied by his attorney to have the sums so paid, refunded, and protested against his future liability to pay.—The defendant, however, still refused to deduct, professing his readiness to appear to any action that might be brought, and from this time down to 1819, the plaintiff went on regularly paying, without deducting or claiming to deduct out of the rent, the tax in dispute, or renewing in any sort the objection of his non-liability to pay.

Under the direction of the learned Chief Justice, the plaintiff was nonsuited at the Middlesex sittings after last Hilary term, with leave to move to enter a verdict for such sum as the court should think he was entitled to. Accordingly

Lawes, Serjt., having obtained a rule *nisi* to this effect,

Onslow, Serjt., showed cause against the rule. The nonsuit was proper on principle and on precedent. It would be bad policy to allow a party to unravel a transaction at the distance of six years. His submission, at the time his claim was made and denied, ought to be conclusive against him. A party, who pays with a full knowledge of facts, though in ignorance of law, cannot recover money so paid, and this principle is so well established that it is not necessary to refer to the numerous cases, in which it is laid down. A recovery by distress is a recovery by process of law, which the party cannot again contest; *Marriott v. Hampton*, 7 T. R. 269; *Denby v. Moore*, 1 B. & A. 123; *Andrew v. Hancock*, *61] 1 Brod. & Bing. 37, S. C. 3 B. Moore, 278; **Stubbs v. Parsons*, 3 B. & A. 516, all show, that money thus paid on account of taxes, may be deducted at the time, but cannot be recovered afterwards; and this appears even from the very terms of the first land-tax act, 4 W. & M. c. 1, s. 13, which has been followed by all the succeeding acts, and also by the terms of the statute imposing the property-tax.(a)

Laws in support of his rule. The plaintiff is entitled, at all events, either as money paid to the use of defendant, or as money paid and received by defendant to plaintiff's use, to the sum claimed to be deducted when the distress was made in 1814. The cases referred to, are chiefly in replevin; in those cases, it was held, that the party could make no deduction after the current year, for the property might be changed, and the tenant have no right to deduct against a succeeding landlord: but it is perfectly consistent with such a restriction, that he may afterwards recover the sum in dispute, in an action for money paid, or money had and received—and this was intimated by the court in *Stubbs v. Parsons*. The sum in dispute here, at least the £1., was not a voluntary payment, but made on compulsion, for a distress is as highly compulsory as any judicial proceeding: though, as being the act of the party it is not, like judicial proceedings, incapable of being afterwards questioned. The land-tax is a landlord's tax as between landlord and tenant, and must be borne by the landlord unless any agreement appears to the contrary, *Rex v. Mitcham*, Doug. 226, and none appears here. *Exall v. Partridge*, 8 T. R. 308, *Astley v. Reynolds*, Str. 916, and *Hales v. Freeman*, 1 Brod. & Bing. 391, are authorities to show, that, in point of principle, this sum, the payment of which the plaintiff could not avoid, may be recovered by him in the action. [¶62] *Graham v. Tate*, 1 M. & S. 609, seems expressly in point. In *Denby v. Moore* there was no dispute at the time of the payment, and *Mariott v. Hampton* was an action brought after judgment in a suit, in which the cause of the second action ought to have been contested.

Onslow, in reply to the cases cited, observed that *Hales v. Freeman* turned on the provisions of a particular act of parliament; and in *Graham v. Tate* the action was brought immediately after the payment had been made, whereas, here, there was an interval of six years' acquiescence. *Cur. adv. vult.*

DALLAS, C. J., now delivered the judgment of the court, and, having stated the case, proceeded as follows: On these facts, we think this case is not to be distinguished as to the general ground from the former cases, in which it has been held, that a payment made under such circumstances is not to be considered as a voluntary payment, and cannot be recovered back:—It would be superfluous to go into the different grounds on which this has been decided, considering how fully they are stated in the printed reports of the different cases both in the court of K. B. and in this court. To these cases I shall, therefore, merely refer; only adding that the present is stronger in degree; for resistance to a demand, dereliction of that resistance, and subsequent and uniform acquiescence, operate more strongly than a payment made in ignorance and silence would have done. The simple point on which we have hesitated for a moment, has been, as to the sum claimed to be deducted, when the distress was made in 1814; and with a view to this, we wished to look into the case of [¶63] *Graham v. Tate*, but on consideration, we think it does not apply in favour of the plaintiff; for in *Graham v. Tate* the claim made was immediately followed up, and never afterwards abandoned, not falling therefore, in point of principle, within all or any of the several grounds on which, as fundamental grounds to sustain actions of this description, such cases have been decided.

The present rule must therefore be discharged, and the nonsuit stand.

Rule discharged accordingly.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
Trinity Term,
IN THE FIRST YEAR OF KING GEORGE IV.

MEABURN TATHAM, Defendant, LLOYD SALISBURY BAXEN-DALE, Tenant, JONATHAN TABOR and Wife, Vouchees.

In a recovery, the preceipe, warrant of attorney, and affidavit of caption were engrossed on parchment and sent to certain commissioners at Rotterdam. The commissioners copied these instruments upon paper (in consequence of the refusal of the Dutch notary to certify upon English documents, which the Dutch law would not allow him to do,) and returned them written upon paper stamped with a Dutch stamp and certified by the Dutch notary. On a motion that the appearance of the tenant might be recorded, the warranty of the vouchees entered, and all other usual proceedings had, notwithstanding these documents were upon paper, the court unanimously rejected the application.

In Easter term last, a writ of *dedimus potestatem* was directed to certain commissioners residing at Rotterdam for the purpose of taking the acknowledgment of Jonathan Tabor and Helen, his wife, residing at the same place, to a warrant of attorney for suffering a common recovery of lands in the county of Middlesex. The usual copy of the *præcipe* and warrant of attorney was made out upon parchment, and also an affidavit, to be sworn by one of the commissioners, on parchment according to the rule of court made in Hilary term 14 G. 3. With these documents, special instructions were, also, forwarded directing the mode in which the caption of the warrant of attorney was to be certified, and the several documents were to be executed, which documents the commissioners were directed to use for that purpose. The commissioners complied with all the instructions excepting that they re-copied the *præcipe* and warrant, and also the affidavit upon paper in consequence of the Dutch notary refusing to certify on the English documents, on the ground that all documents bearing his certificate, must, according to the laws of Holland, bear the Dutch stamp, and that he could not, consistently with his duty, certify upon the documents so sent out. The documents so written upon paper were accordingly stamped with a Dutch stamp, and certified by the notary.

Hullor, Serjt., now prayed that the appearance of the tenant named in the writ of entry might be recorded as of this present Trinity term, that the warranty of the vouchees might be also duly entered, and all other usual proceedings be had and taken thereon, notwithstanding the acknowledgment, and also the affidavit of the due caption of the warrant of attorney were written upon

paper instead of parchment. He urged, that, though the practice was for the *præcipe* and warrant of attorney to be engrossed on parchment, yet no rule of court absolutely required this; and the rule of court which required the affidavit to be so engrossed, could never have been intended to operate in exclusion of parties altogether, a hardship which would arise in the present case; for the laws of the place where the parties resided *absolutely prevented them [*67] from complying with the rule of this court.

But the court, after conferring with the officer, thought that they could not relax the rule and practice of the court, and rejected the application, recommending further endeavours to get the proceedings written on parchment and returned during the term, and suggesting, that the return to the *deditus* might be enlarged and the writ resealed. And see 1 Brod. & Bing. 472.

Hullock took nothing by his motion.

COLYER v. SPEER, Esq.

1. The trustees of an outstanding satisfied term assigned in trust to attend the inheritance, may sue the sheriff for not retaining, after notice to do so, in an execution against the tenant, a year's rent due to the landlord.
2. A notice to the sheriff in such case, stating that the rent was due to J. W. and the mortgagees of his estate, and signed by a person who was not the receiver appointed by the mortgage deed, was held sufficient.
3. The sheriff is liable, in such case, if he remove any of the tenant's goods without retaining the year's rent.

CASE against the defendant, as sheriff of Surry, for removing, under an execution, the goods of Pannell, the occupier of certain lands, without satisfying a year's rent due from Pannell to his landlord, due notice having been given to the sheriff, after the taking and before the removal of the goods, that such rent was due.—At the trial before DALLAS, C. J., Middlesex sittings after Easter term last, the plaintiff's title appeared to be as follows: Woodroffe, the original owner of the lands before mentioned, had in 1812 charged them with an annuity of 468*l.*, and in 1813 with an annuity of 92*l.* These two annuities were secured to the purchasers of them by two terms, each of 99 years, granted to the plaintiff in trust for such purchasers. In 1816 Woodroffe borrowed 10,000*l.* on mortgage, paid off the two annuitants, and conveyed the lands in fee to the mortgagees: By the mortgage deed *it was, among other things, declared, [*68] that the plaintiff should stand possessed of the two terms before mentioned (then outstanding and satisfied) in trust for the mortgagees, and to attend the inheritance; and that, until default made in payment of the 10,000*l.* and interest, Woodroffe, the mortgagor, might quietly enjoy the lands; and James Seton was appointed receiver for the mortgagees. Pannell, the occupier, held the lands under an agreement for a lease from Woodroffe, bearing date the 29th of September. The notice served on the sheriff was as follows: “*Copeland v. Pannell.* Sir, I do hereby give you notice that there is due to William Woodroffe Esq., and the mortgagees of his estate in the parish of Worplesdon, in the county of Surry, from John Pannell the defendant, the sum of five hundred pounds for one year's rent, at Michaelmas day last past, which you are to pay to me as receiver of the rents of the same estates. R. Edwards, 2d November, 1819, Castle Street, Holborn.—To the sheriff of the county of Surry, and to Mr. Jervis, his officer, and all others whom it may concern.”

A witness proved that the whole of the occupier's property (worth about 1100*l.*) was not taken away by the sheriff, but rather more than half. A verdict was found for the plaintiff, under the direction of the learned Chief Justice, with leave for the defendant to move to enter a nonsuit. Accordingly,

Pell, Serjt., now moved for a rule *nisi* to that effect, on the grounds,

First, that the action should have been brought in the name of Woodroffe, and not in that of Colyer.—The statute of 8 Ann. c. 14, he contended, was

passed not to protect the trustee of an outstanding satisfied term, but the person who was beneficially interested as landlord of the premises.

* 69] Secondly, that the notice was insufficient and ambiguous, conveying no certain information to the sheriff. If the mortgagees were the persons accustomed to receive the rent, their names should have been specified; if Woodroffe had been accustomed to receive it, mention of the mortgagees should have been omitted; if the court should hold that Colyer was the proper party to sue, the notice should have ordered the sheriff to pay to Colyer; and, at all events, it should have been given by Seton, the receiver named in the mortgage deed, and not by Edwards.

Thirdly, it appeared that the sheriff had left some property on the premises, and it ought to have been shown that this was not sufficient to satisfy the rent in arrear.

Sed per Curiam. The plaintiff is a landlord within the terms of the statute. It never can be supposed that one, who, like the plaintiff, has a title, on which he might recover in ejectment, is excluded from suing as landlord for a wrong committed by the sheriff in respect of the premises to which the plaintiff is so entitled.

With regard to the notice, the sheriff is informed that rent is due, and that is sufficient to put him on his guard. To some notice he is unquestionably entitled, but as the statute has not specified any particular form, there can be no dispute about the terms.

As to the third point, the sheriff infringes the statute, if, after notice of rent in arrear, he remove any of the goods without retaining that rent.—The words of the statute(a) are "no goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any

* 70] execution on any pretence whatsoever *unless the party at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent, &c. And the sheriff or other officer is thereby empowered and required to levy and pay to the plaintiff as well as the money so paid for rent as the execution money." It is clear that the sheriff must first levy for the rent and then for the execution.—It would be a great hardship on the landlord to oblige him to watch the sheriff's officer for the purpose of seeing when the execution is finished, and whether or no sufficient distress is left behind. The statute requires no such thing.

Rule refused.

(a) 8 Ann. c. 14, s. 1.

WILLIAM BROOKE, Esq. v. SAMUEL ENDERBY and WILLIAM GILPIN.

The plaintiff carried on dealings in one general and unbroken account with A., one of the defendants, as his banker and army agent, from a period before 1807 up to 1819, when A. became bankrupt, and a balance was struck, none having been before struck since 1816. In 1807, defendant B. became a partner with A., and continued so till 1817, but the partnership was secret, and unknown to plaintiff till A.'s bankruptcy, defendant B. never interfering (to the knowledge of plaintiff) in the business carried on by A.; at the expiration of the partnership in 1817, a balance was due from defendants to plaintiff; between the expiration of the partnership and A.'s bankruptcy, A. paid to plaintiff, and also received from plaintiff, several sums. In an action against the defendants for the balance due from them at the expiration of the partnership (A. having pleaded his bankruptcy and certificate,) *Held*, That B. might consider the sums paid by A. to plaintiff after the expiration of the partnership, as paid in reduction of the balance due at the expiration of the partnership, and might take credit for them without giving credit for any sums received after the expiration of the partnership by A. on account of plaintiff.

THIS was an action of *assumpsit* for money lent, money paid, money had and received, and on an account stated. The defendant Enderby pleaded the

general issue, and the defendant Gilpin his certificate, under a commission of bankrupt, which was admitted by the plaintiff. The cause came on for trial at the London *sittings before Easter term, when the jury found a verdict [*71 for the plaintiff for 333*l.* 17*s.* 5*d.* subject to the opinion of the court on the following case. The defendant Enderby became a partner with the defendant Gilpin in the several businesses of woollen draper, army clothier, and army agent, by indenture dated the 24th September, 1807, for the term of 10 years. Previous to the year 1807, the plaintiff, being a lieutenant colonel in his Majesty's service, employed the defendant Gilpin as his agent, and continued to employ him as such until the bankruptcy of Gilpin on the 1st of April, 1819; during which time the plaintiff kept a running account with Gilpin; Gilpin, from time to time, receiving the pay and allowances, and also dividends due to the plaintiff on stock and other moneys on his account, and from time to time making payments to him or his order: the plaintiff being in the habit of drawing upon Gilpin as his banker,(a) who from time to time furnished copies of the account to the plaintiff. Gilpin carried on business in his own name only, and Enderby never interfered with the business to the knowledge of the plaintiff, nor was he known or suspected by the plaintiff to be or have been a partner therein until after the bankruptcy of Gilpin on the 1st of April, 1819. The plaintiff and Gilpin continued to deal together after the 24th September, 1817,(b) down to the period of Gilpin's bankruptcy, in the same way, in which they had before dealt; and the account between them continued to be kept in the same way, no distinction being made as to the time before and after the 24th September, 1817; but the receipts and payments prior and subsequent to that period formed part of one general account. No rest was made or balance struck in the account after the 1st July, 1816, *down to the bankruptcy of Gilpin; and, during the existence [*72 of such account and dealings, there was, at all times, a considerable balance due to the plaintiff. No notice of the dissolution or expiration of the partnership between Gilpin and Enderby was given. The sum of 1773*l.* 9*s.* 4*d.* was paid into court by Enderby, and, in calculating the sum to be so paid into court, Enderby sought credit for all sums paid by Gilpin to the plaintiff after the 24th September, 1817, without giving credit for any sums received after that day by Gilpin on account of the plaintiff; which sum consisting of dividends on stock, &c. so received by Gilpin, on account of the plaintiff after the 24th September, 1817, amounted to 306*l.* 10*s.* 5*d.* The verdict was taken for the amount of such sums of money and interest calculated up to the 20th April, 1820. If the principle on which Enderby had calculated the sum paid into court were correct, it was admitted, on the part of the plaintiff, that the sum of 1773*l.* 9*s.* 4*d.* paid into court by Enderby, covered and satisfied the whole of the plaintiff's demand upon him with interest theron.

The question for the opinion of the court on this special case, was whether the plaintiff was entitled to recover the sum of 333*l.* 17*s.* 5*d.* or any part thereof. If the court were of opinion in the affirmative, then the verdict was to stand or be reduced as the court should direct: otherwise a nonsuit was to be entered.

For the defendant, Enderby, it was contended at the trial, that the account between the plaintiff and Gilpin being one entire account, the payments made by Gilpin after the expiration of his partnership, not having been at the time appropriated to any particular debt by the plaintiff, must, especially as Gilpin acted as banker to the plaintiff, go in reduction of the old balance subsisting against Gilpin at the expiration of the partnership in 1817; while the expiration of the partnership precluded Enderby from being accountable for any re-

(a) The dealings and transactions here alluded to appeared by an account kept by Gilpin, a copy of which accompanied the case, and was considered as part of it.

(b) On which day the partnership expired by the effluxion of time.

*73] ceipts *by Gilpin subsequent to such expiration, and *Clayton's case*, 1 Merivale, 572, (a) was relied on.

Hullock, Serjt., now endeavoured to distinguish *Clayton's case* from the present, arguing, that, in *Clayton's case*, the dealings were carried on by Clayton with the bank, after the death of one of the banking partners, with the knowledge of that circumstance; whereas, here, the plaintiff never knew that Enderby was a partner with Gilpin. He also contended that if the debtor did not, at the time of payment, appropriate the sum paid to any particular debt, the creditor might do so whenever an event occurred which raised a different order of things between them: he cited *Newmarch v. Clay*, 14 East, 239.

But the court thought the case not distinguishable in principle from *Clayton's case*, and gave Judgment that a nonsuit be entered.

Bosanquet, Serjt., was to have argued for the defendant Enderby.

(a) See also *Bodenham v. Purchas*, 2 B. & A. 45, and *Evans v. Drummond*, 4 Esp. 289.

BROWN v. HOWARD.

Plaintiff employed defendant in 1808, to lay out money for him in the purchase of an annuity, and discovered in February, 1814, that the security provided by the defendant was void within the defendant's own knowledge at the time of the purchase. In January, 1820, plaintiff sued defendant in assumpsit for breach of an implied contract to provide good security: Held, that, the action proceeding on the contract and not on the fraud, the statute of limitations was a good bar.

The plaintiff declared against the defendant in *assumpsit* on an implied promise to lay out certain moneys of the plaintiff in the purchase of an annuity •74] *on good, valid and sufficient security in consideration of certain reasonable reward to be therefore paid to the defendant by the plaintiff. Breach:

that the defendant did not lay the plaintiff's money out on good, valid or sufficient security, but on bad, invalid, insufficient, fraudulent and fictitious security, to wit, a pretended security of certain copyhold premises whereof one W. Alston pretended to be seized, whereas in truth W. A. was not seized thereof; of all which premises the defendant had notice. The defendant pleaded the general issue and the statute of limitations. At the trial before DALLAS, C. J., Middlesex sittings after Hilary term last, it appeared, that the annuity was granted in 1808 and paid till February, 1814, when, Alston, becoming insolvent, it was shortly afterwards, and within six years of the commencement of the action (in January, 1820,) discovered that he had no title to the premises in question. The jury found that the defendant knew that Alston never had any title to the premises, and gave a verdict for the plaintiff; the learned Chief Justice allowing the defendant to move to enter a nonsuit on two objections to the verdict; one of which was, that the statute of limitations operated as a complete bar to the plaintiff's recovery. Accordingly

Vaughan, Serjt., having obtained a rule *nisi* to set aside the verdict and enter a nonsuit,

Lens and Pell, Serjts., showed cause against the rule, and, with respect to the statute of limitations, contended, that after the declaration had stated this to be a fraudulent security, and the jury had found that the defendant was acquainted with all the circumstances, it was neither more nor less than a case of gross fraud—that it had been repeatedly held that the statute of limitations did not apply in cases of fraud, *South Sea Company v. Wymondsell*, 3 P. Wms.

*75] 143; and that, at all events, the action, here, had been brought within six years after the fraud had been discovered. If this had been a sale of timber which the vendor knew to be unsound at the time, but which the purchaser might not have been able to discover was the case, till six or seven years afterwards, he would be deprived of all remedy unless he could bring his action within six years after the discovery. The present case was the same in effect; and this distinguished it from all the decided cases. In those cases the fraud

was discovered at the time or shortly afterwards, as in *Battley v. Faulkner*, 3 B. & A. 288. Here, the plaintiff could not sue so long as his annuity was paid; when it ceased to be paid, and the fraud was discovered, nearly six years had elapsed.

DALLAS, C. J. If this action had been brought expressly to recover damages for a fraud the case might have been different; but here, though fraud is alleged in the breach, the gist of the action is not fraud, but a contract or promise declared on in *assumpsit*; and the promise as stated in the declaration, namely, a promise to obtain good and sufficient security for the plaintiff's money, does not seem to amount to a warranty. The plaintiff will not be without remedy because he will only be nonsuited here, and may if he deems it to his advantage bring another action, the ground of which may be fraud: though on the propriety of such a step we give no opinion: but in *Bree v. Holbech*, Dougl. 632, it is laid down that in cases of fraud the limitation only runs from the time when the fraud is discovered.

PARK, J. I am of the same opinion, although this is a case of such hardship on the plaintiff, that the *court would, if it were possible, get out of the course of the decisions. But they cannot set aside the express words of [*76] the statute, or the decisions which seem exactly in point. What are the words of the statute? "All actions of account and upon the case—shall be commenced and sued—within six years next after the cause of such action or suit, and not after—21 Jac. 1, c. 16, s. 3." In *Battley v. Faulkner* the point was well put by one of the judges, "the only question is, when the cause of action accrued; for the statute then attached. I think that the cause of action accrued the moment the defendant failed to perform that which he agreed to do." But the strong case is *Short v. McCarthy*, 3 B. & A. 626, lately decided in the King's Bench. That case is the same as the case before the court, if copyhold be ready for stock.

BUROUGH, J. This declaration does not meet the plaintiff's case.

RICHARDSON, J. The statute of limitations is a bar here, because the gist of the action is a promise.—The two cases of *Battley v. Faulkner* and *Short v. McCarthy*, are conclusive on the point. Rule absolute for a nonsuit.

Vaughan, Serjt., was to have argued in support of the rule.

*TOMLINSON and WHITE v. SHYNN.

[*77]

Where a sheriff by mistake returned to a *fieri facias* that he had a sum in his hands to be paid to the plaintiffs, when in truth he had not, the sum in question having been paid (through want of caution in the sheriff's officer,) to the solicitor of a commission of bankrupt issued against the defendant, under which commission one of the plaintiffs was an assignee: Held, that this plaintiff knowing of such payment and having omitted to make an early objection to it, the sheriff was absolved from paying to the plaintiffs the sum mentioned in his return.

THE plaintiffs had issued execution against the defendant for 171*l.* The sheriff's officer, Slade, found one Cohen in possession of defendant's goods under a regular assignment as security for 150*l.* due to him from defendant.—Cohen desired the sheriff's officer to sell the goods, which were accordingly sold, and Cohen received the proceeds, promising, after deducting the 150*l.* due to himself, to pay the remainder to Slade on behalf of the plaintiffs. When the amount of the goods was ascertained, the sheriff, on the faith of this promise returned that he had in his hands 53*l.* 6*s.* 6*d.*, ready to be paid to the plaintiffs. In the mean time Shynn became bankrupt, and White, one of the plaintiffs was chosen an assignee.—Cohen, after deducting his own 150*l.* from the proceeds of the sale, paid 53*l.* 6*s.* 6*d.*, the remainder of those proceeds, not to Slade as he had promised, but to Day, the solicitor to the assignees under Shynn's commission.—This payment to Day, if not known to the plaintiffs at the time, was known and not objected to, (as it was sworn) long before they made the application to the court hereafter mentioned.—Notwithstanding which

Lawes, Serjt., in Michaelmas term last, obtained a rule *nisi* for the sheriff to pay over to the plaintiffs, their attorney or agent, 53*l.* 6*s.* 6*d.*, the sum returned by him on the *fieri facias* to be in his hands. The motion stood over on various grounds from that term till this day, when

Pell, Serjt., on behalf of the sheriff, insisted that, by not objecting as soon as he knew of it, the plaintiff White had assented to this payment made by Cohen *78] to Day on behalf of the assignees, of whom White was himself "one, that this assent or acquiescence amounted to a ratification of the payment, equivalent to a previous order; and, that, by such ratification, the sheriff was absolved from paying over money which it was clear he had never received, and which was only by a mistake returned as being in his hands, though he certainly would be bound by such return were it not for this ratification on the part of White.

Lawes, in support of his rule, contended that the knowledge of the plaintiff White, and the omission to object to what had been done, did not amount to a subsequent assent.

Sed per Curiam. There is a subsequent assent sufficient to ratify this payment. We think, under the circumstances of the case, the sheriff is not bound to pay over the money.

Rule discharged with costs.

BUTTS, MOUNTFORD, and BURTON, Assignees of FOSSETT, COOPER, and HOWARD, Bankrupts, v. SWANN, CHAPPELL, and HEYWOOD.

The following letter from F. and Co. to their correspondents S. and Co.: "Gentlemen, we request you will pay to Messrs. H. C. and Son, or their order, out of the first proceeds that become due of our stock of gunpowder now in your hands, 600*l.*, and charge the same to our account," was held an order for the payment of money under 55 G. 3, c. 184, and liable to be stamped as such, and not with an agreement stamp, although the letter formed part of a correspondence between the three houses, being followed by a letter to H. C. and Son from S. and Co., promising to pay as directed, *provided they should be in funds for the purpose*, and by other letters between the houses of F. and Co. and S. and Co. relating to and confirmatory of the same order.

TROVER for gunpowder: the defendants pleaded the general issue.

The cause was tried at the London sittings after Hilary term last before DALLAS, C. J., when the jury found a verdict for the plaintiffs for 321*l.* subject to the *79] opinion of the court on a case which, among other things, stated the following facts: the defendants were commission merchants in Liverpool, and had been intrusted with gunpowder by the bankrupts, before their bankruptcy, to be sold on their account. The present action was brought to recover the value of 84 barrels of gunpowder belonging to the bankrupts, which were in the hands of the defendants on the 8th July, 1817, when the commission issued against Fossett, Cooper, and Howard.

The defendants gave in evidence the two following instruments, each stamped with a 1*l.* stamp, subscribed respectively by the bankrupt, Mark Fossett, for the firm of Mark Fossett and Co., and by the defendants; and delivered to the parties to whom they were addressed, according to the course of post from their respective dates. Neither of these instruments had any stamp at the time of being written; but, before the trial, each was stamped with an agreement stamp of 1*l.* on payment of a penalty.

London, 29th August, 1816.

Messrs. Swann and Heywood,

Gentlemen,—We request you will pay to Messrs. Henry Cooper and Son, or their order, out of the first proceeds that become due of our stock of gunpowder now in your charge, 600*l.*, and charge the same to our account.

We remain, gentlemen,

Your most obedient servants,

MARK FOSSETT AND CO.

*Liverpool, 2d October, 1816. [*80]

Messrs. Henry Cooper and Son,

Gentlemen,—We have received Messrs. Mark Fossett and Co.'s letter of the 29th of August last, directing us to pay to you or your order 600*l.* out of the first proceeds of their stock of gunpowder now in our charge; and we have also their letter of the same date directing us to pay to Mr. Augustus Hughes, or his order, 200*l.* out of the proceeds of the said stock.—These sums we can have no objection to pay as directed, provided we shall be in funds for the purpose, subject however, in the first place, to the payment of our advances, interest, and commission on the said consignment.

We are, gentlemen,

Your obedient servants,

(Signed)

SWANN AND HEYWOOD.

It was objected, on the part of the plaintiffs, that these instruments could not be read in evidence, as there was no stamp upon them at the time they were written, and the stamp afterwards affixed was not the proper stamp. The Chief Justice allowed them to be read in evidence, saving to the plaintiffs the point whether they ought to have been admitted. The following letters, none of which were stamped, were also read in evidence on the part of the defendants:

London, 27th September, 1816.

Messrs. Swann and Heywood,

Gentlemen,—Messrs. Henry Cooper and Son are surprised that you have not noticed the letter written by us to you in their favour, dated 29th August, last, and which *Mr. Heywood, when in town, promised should be done, [*81 but wished it to be passed through the house. You have also one of the same nature for Mr. A. Hughes.—We beg your attention to our request that you will forward them by return of post to those gentlemen, and at the same time we shall be obliged by receiving our account current with you.

We are, gentlemen,

Your most obedient servants,

MARK FOSSETT AND CO.

Liverpool, 16th December, 1816.

Messrs. Mark Fossett and Co.

We request you will have the goodness to inform us whether we are to consider the undertaking given by us to Henry Cooper and Son and Mr. Hughes still in force, which binds us to apply the whole proceeds of the stock in our hands, in the first instance to pay them, or whether our acting contrary to this arrangement will not be improper. Our only motive for this precaution is to keep clear of blame from all parties.

We are, &c.

SWANN AND HEYWOOD.

London, 23d April, 1817.

Messrs. Swann and Heywood,

Gentlemen,—Confirming our letters of 29th August last, requesting you to pay out of the proceeds of our stock of gunpowder to Messrs. H. Cooper and Son, 600*l.*, and to Mr. Augustus Hughes 200*l.*, we have now to request that you will pay the balance, when realized, to Mr. Joseph Searle of Fetter Lane, London, and place the same to our account.

We are, gentlemen,

Your most obedient servants,

MARK FOSSETT AND CO.

*Liverpool, 22d May, 1817. [*82]

Mark Fossett, Esq.

Dear Sir,—We have now the pleasure to enclose our account current to 31st December last, balance to your credit 76*l.* 1*s.* 7*d.*, which sum, upon your con-

firming the account, we will immediately remit to Messrs. Henry Cooper and Son, agreeably to your letter of 29th August, 1816.

The sales of gunpowder made by Swann, Chappell, and Heywood, up to the present time, amount to 140*l.* 17*s.* 9*d.*, but no part of this sum is yet due from the purchasers; when received, it shall be remitted in the same manner to the parties whom you have instructed us to pay over these proceeds to.

We remain, dear sir,

Your obedient Servants,

SWANN AND HEYWOOD.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover the sum of 321*l.* or any part thereof; and a verdict or non-suit was to be entered accordingly.

Vaughan, Serjt., for the plaintiffs, among various other objections, contended that the first of the before mentioned letters was an order to pay money within the 55 Geo. 3, c. 184, sched. part 1, and as such ought to have borne a stamp at the time it was written; and there being no stamp at that time, a stamp could not be applied afterwards under sect. 10, which comprehended only cases where an improper "stamp had been applied in the first instance.

*83] He cited *Firbank v. Bell*, 1 B. & A. 36.

Hullock, Serjt., contra. This letter does not constitute a bill of exchange or a strict order for the payment of money. It is not a bill of exchange, because the fund out of which the payment was to be made was uncertain;—it is not an order for the payment of money, because Cooper and Son could make no demand by virtue of it till Swann and Co. had given their assent, and that assent they only gave provisionally. In fact, it forms no more than part of the materials of an agreement, to have recovered on which the party must have declared specially on both the stamped letters.—But if it should be held to be an order for payment of money within the statute, the intent and meaning of the statute in classing instruments of this description among bills of exchange, was not to make that a bill of exchange which never can be such, but only to answer the purposes of revenue; and those purposes being answered by the application of the agreement stamp, the intent and meaning of the statute has been sufficiently pursued.—In this view, the intent of the statute is consistent with the law respecting bills of exchange: in any other view, the statute must be held inconsistent with law, by making an order to pay out of uncertain funds constitute a bill of exchange.—The enactment, therefore, of the 31 Geo. 3, c. 35, by which parties are prohibited from stamping bills after making them, cannot apply to such instruments as these, under which money is to be paid out of a particular fund.

In *Firbank v. Bell* there was but one document which contained the order. The letters in the present case are only two of several, constituting an entire correspondence; and by 55 Geo. 3, c. 184, sched. part 1, when any set of letters constitute an agreement, it shall *be sufficient to stamp one of them.

*84] By those means the purposes of the revenue are satisfied in cases like the present; but, if the first letter be deemed an order for payment of money within the statute, the consequences must be most extensive, for there is scarcely a mercantile correspondence out of which many such orders might not be extracted.

Vaughan, in reply, urged, that if it were sufficient to stamp, at any period subsequent to the making, an order falling so directly within the terms of the statute as the present, the purposes of the revenue would be entirely defeated, for no stamp would be had except in litigated cases.

Dallas, C. J. This case is now narrowed to a single point; it is unnecessary, therefore, to discuss the others which have been raised; for the important point now to be considered, is, whether this instrument falls within the different provisions of the acts referred to. It is agreed that, if this instrument consti-

tutes a bill of exchange, it could not be stamped after it was first issued: if, therefore, this be an order for the payment of money, and if an order for the payment of money stand upon the same footing as a bill of exchange by the provisions of the 55 G. 3, c. 184, the argument against its admission in evidence would be conclusive.

Does it, then, stand on the same footing as a bill of exchange by virtue of that act? Now the stamp is imposed on bills, drafts, or orders for the payment of money, the act classing them together: then, in a subsequent part of the schedule, bills, drafts, and orders for the payment of money at a future day, are made liable to the duties imposed by the act; and all bills, drafts, or orders for the payment of any sum of money out of any particular fund, which may or may not be available *or upon any condition or contingency which may or may not be performed or happen, are, by that act, to be deemed bills, ["85 drafts, or orders for the payment of money within the schedule of the act.

By the 8th section, all the provisions of the former acts are made to apply to the subject matter of the latter.

An order for the payment of money seems to me, therefore, as far as the purposes of this act are concerned, to be placed on the same footing with bills of exchange and promissory notes; and, if it be so placed, no distinction can be drawn, after the express provision in the 55 G. 3, between orders for the payment of money out of a particular fund and bills and notes in general. Without saying, therefore, that the statute alters the nature of instruments, or makes that a bill of exchange which would not otherwise be such, it is clear, that, under the 55 G. 3, orders of this description fall within the same provisions as bills of exchange and promissory notes. And this seems to me to be decided by the case of *Firbank v. Bell*; a case essentially the same as that before the court. In that case the order was to pay over to certain persons a sum of money, when a cargo of mahogany was sold, in such bills as might be received from the sale; —an order which is directed in terms almost precisely the same as the present.—The sale might or might not have taken place, bills might or might not have been received; and the case now under consideration is, if possible, the stronger of the two. Such was the order; then followed the letter from the party in whose favour the order was made, requesting the attention of the parties, who were to effect the sale, to the before-mentioned order; and then came the answer to that letter from the parties who were to effect the sale, stating their readiness to attend to the order after they had paid themselves a sum which they had been previously in advance.—This, therefore, like the "case under ["86 consideration, does not consist simply of an order to pay money out of a future fund which might or might not be sufficient, but contains also a subsequent correspondence. The cases, therefore, do not differ, except in the point ingeniously attempted to be distinguished at the bar. In the judgment of the court in *Firbank v. Bell* it is said "There is nothing to which the name of an agreement can be given if you do not pray in aid the order; that is the only thing by which the bankrupt is personally implicated, for he is not a party to the letters;" and it is, therefore, said that there was in that case but one document which contained the order. Whether or not that distinguishes the case from the case now before the court I shall presently examine. Lord ELLENBOROUGH then proceeds; "the order alone affects the bankrupt, and that amounts to nothing more than an order for payment. It falls then within the description of the act of parliament, viz. an order for the payment of money out of a fund which may or may not be available. It was the object of the legislature in framing this provision to treat as promissory notes and bills of exchange, and to subject to a stamp duty such instruments as being payable on a contingency or out of a particular fund could not in strictness fall under that denomination." Adverting, therefore, to the distinction which exists, independently of the statute, between bills and notes payable at all events, and orders

payable out of a particular fund, the learned Chief Justice says, that the object of the statute was to put those instruments, which before differed from the former class, on the same footing with them.—I see no difficulty, therefore, in this case on principle, and on authority it falls within the decision before mentioned, unless the instrument is to be considered as an agreement, and not as an order for payment of money. The argument for that position appears to me to be a fallacy. *The order is complete when it issues, and does not depend upon any subsequent assent to make it a valid order. According to the doctrine contended for, no order can be considered absolute if followed by a subsequent correspondence.—But a similar order, though succeeded by a correspondence, has, in *Firbank v. Bell*, been considered an absolute order; I think that this is such, and that it ought to have received a stamp in conformity with the provisions of the statute 55 G. 3.

PARK, J. The only question now to be determined in this case is, whether these papers were properly stamped. It is admitted at the bar that they fall within the provision of the act, unless they can be distinguished from the subject-matter on which the act was intended to operate. I think that this is not a bill of exchange, and have no wish to disturb the old authorities, which say that an order to pay out of a contingent fund is not a bill of exchange. This brings us to consider whether it was the object of the statute 55 G. 3, c. 184, to subject instruments like the present to the same provisions as bills of exchange and promissory notes; and that such was the object of that act seems to me clear, from the words "All bills, drafts, or orders for the payment of any sum of money out of any particular fund which may or may not be available, or upon any contingency which may or may not be performed," &c. Such instruments were not taxable before; but by the last mentioned statute they are put on the same footing as bills of exchange and promissory notes; and in this opinion I am borne out by the language of Lord ELLENBOROUGH in *Firbank v. Bell*; for that learned person seems to have had in his mind the very point raised here, viz. that the intent of the act would be pursued if this were considered an agreement. His lordship *says, speaking of the order for payment, "it falls, then, within the description of the act of parliament, viz. an order for the payment of money out of a fund which may or may not be available," 1 B. & A. 39. That case goes the whole length of the doctrine contended for by the plaintiffs.—The order, here, is an order for the payment of money, notwithstanding the ingenious argument, that the whole correspondence forms but one agreement.

BURROUGH, J. By the 37 G. 3, c. 90, a stamp duty is imposed on "any bill of exchange, draft, or order for the payment of money," and the only question is, whether this is an order for the payment of money out of a particular fund; for, such an order, by the 55 G. 3, that act adopting the provision of the former act, is subject to the same duties as bills of exchange and orders for the payment of money generally: that is the clear intention of the act; so that the case is the same as if the instrument were at once within the 37 G. 3.

RICHARDSON, J. The question to be decided is, whether this instrument is properly stamped. By the statute 31 G. 3, c. 25, s. 19. No bill of exchange, promissory note, or other note, draft, or order liable to the duties by that act imposed can be given in evidence without being lawfully stamped, nor can the commissioners stamp such instruments after they are made. The 48 G. 3, c. 149, does not in terms make the same provision; but the commissioners are authorized to do all things necessary for carrying the latter act into execution, in like manner as former commissioners were authorized to do all things necessary for carrying into execution the former acts. (a) An order like the order in the present case is not a bill of exchange or order under those acts, but

(a) The 34 G. 3, c. 32, authorizing commissioners to stamp bills, &c., after they are drawn, was only a temporary act, which has expired. See Bayley on Bills, 3d ed. p. 26, note.

is put on the same footing with such instruments by 55 G. 3. Though not a bill of exchange in a commercial sense, it is so within the view of the revenue acts. It has been argued, that, taking the subsequent correspondence into consideration, this letter only forms part of an agreement, and therefore is distinguishable from *Firbank v. Bell*, where the bankrupt only intervened once; but the first letter here is an order for the payment of money, which order is confirmed in one of the subsequent letters.—On the whole, therefore, I am of opinion that the plaintiffs are entitled to retain their verdict.

Judgment for the plaintiffs.

SAMPSON and Others, Assignees of COOK, a Bankrupt, v. BURTON and Others.

1. Goods in the possession of a bankrupt, and, but for the bankruptcy, his property, being taken in execution after the act of bankruptcy, but two months before the issuing of a commission against the bankrupt, were (*in assumpsit* by the assignees of the bankrupt, on a guarantee given to the bankrupt,) described in the declaration as the goods of the bankrupt: *Held*, that such description was proper.
2. A guarantee against contingent damages cannot form the subject of a mutual credit under 5 Geo. 2, c. 30, s. 28.

Assumpsit on a guarantee. The case proved at the last Devon assizes, before Wood, B., was as follows: Cook was a warehouseman at Plymouth. In March and April, 1817, the defendants shipped for one Andrews, according to his orders, a quantity of gunpowder, which was received into the magazine of Cook, by the direction of Andrews. The defendants, in May, 1817, [*90] suspecting the insolvency of Andrews, endeavoured to stop the powder in *transitu*, and accordingly wrote to Cook, requesting him to obtain, on their behalf, the powder which they had sent to Andrews, and guarantying Cook, from any responsibility or loss which should accrue to him for so doing. Cook did so retain the powder, and in June, 1817, delivered it to the defendants. Andrews afterwards sued Cook in trover for the powder, and having obtained judgment against him, levied execution on his goods, on the 21st November, 1818. On the 18th of February, 1819, a commission of bankrupt issued against Cook, on a secret act of bankruptcy committed by him in April, 1818.

At the time of the bankruptcy Cook owed the defendants 25*l.* 2*s.* 7*d.* upon a balance of accounts. The defendants, among other objections at the trial, took an exception to the declaration, which in one count described the goods taken under Andrews' execution as the goods of Cook, and in another stated that they were taken "as and for the goods of Cook," contending that this was a misdescription; the commission issued in February, 1819, having relation to the act of bankruptcy committed in April, 1818, and, vesting the goods in the assignees from that time; so that they could only be described as the goods of the assignees. The defendants also contended, that their guarantee constituted a mutual credit with Cook, and that, therefore, they were entitled, under 5 G. 2, c. 30, s. 28, to set off against any sum recovered upon the guarantee, the sum of 25*l.* 2*s.* 7*d.* so due to them from Cook.

"The learned baron thought that for the purposes of Andrews' execution, the goods were the goods of Cook, no commission having then been issued against him; and that the guarantee did not constitute a mutual credit:—but reserved the points for the consideration of this court. Accordingly, the jury having found a verdict for the plaintiffs.

Vaughan, Serjt., obtained a rule *nisi* to set aside this verdict and enter a non suit, on these, among other grounds.

Pell and *Bosanquet*, Serjts., now showed cause against the rule, and, on the first point contended, that with reference to any act of Andrews, before the commission was sued out, the goods were properly described as the goods of Cook,

he having a special property in them with respect to all but his own assignees.—This was rendered quite clear by the 49 Geo. 3, c. 121, s. 2, by which all executions are protected if levied more than two months before the commission was sued out. They cited *Webb v. Fox*, 7 T. R. 391, *Fowler v. Down*, 1 B. & P. 44. On the second point, they urged that the guarantee only gave Cook a possibility of a right to sue, a possibility of a claim to unliquidated damages: that, if Cook or the assignees had been defendants, the guarantee never could have been resorted to as a set-off, and, that, on these grounds, it was not entitled to be considered a mutual credit, *Glenie v. Edmunds*, 4 Taunt. 775, *Crawford v. Stirling*, 4 Esp. 207.

Vaughan and *Hullock*, Serjts., in support of the rule, as to the first point, denied that the 49 Geo. 3, c. 121, at all affected the question. That act allowed executions, "sued out two months before the issuing of a commission, to be valid notwithstanding any prior act of bankruptcy; but it did not alter the property of the goods, or make that the property of the bankrupt which was in truth the property of the assignees.—It enabled the party suing out the execution to take the assignees' goods without interruption: but it did not call those goods the goods of the bankrupt.—The bankrupt himself could not have called them his goods in an action of trover, and the assignees, standing in his place, were subject to the same law. *Fox v. Webb* and *Fowler v. Down* did not at all apply. As to the second point, it might be admitted that this guarantee could not constitute a set-off; but mutual credit, under 5 G. 3, c. 30, is by no means confined to such claims as might form the subject of set-off. The language of the Lord Chancellor in *Ex parte Smith*, 1 Swanst. 34, is to the same effect. According to Lord ELLENBOROUGH, mutual credit, *ex vi termini*, imports unliquidated damages.(a) In *Olive v. Smith*, 5 Taunt. 66, goods placed in the hands of a broker were held to constitute a mutual credit; though, in that case, it could no more have been known beforehand what sum the goods might be sold for, than what sum the defendants in this case might be called on to pay on their guarantee.

DALLAS, C. J. I am of opinion that this rule ought to be discharged.—As to the objection that the goods taken under the execution of Andrews ought to have been described as the goods of the assignees, they were clearly the goods of Cook for this purpose; the execution having issued two months before the commission, and the statute 49 Geo. 3, c. 121, s. 2, having enacted "that in all cases of commissions of bankrupt thereafter to be issued, *all executions and attachments against the lands and tenements or goods and chattels of the bankrupts, *bonâ fide* executed or levied more than two calendar months before the date and issuing of such commission, shall be valid and effectual, notwithstanding any prior act of bankruptcy committed by such bankrupt, in like manner as if no such prior act of bankruptcy had been committed, provided the person at whose suit such execution or attachment shall have issued, had not at the time of executing or levying the same, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent or had stopped payment." This, therefore, being an execution levied and executed two months before the commission, was, under the circumstances of the case, valid and effectual; that is, valid and effectual as against the goods of the bankrupt.—As to the arguments on the subject of mutual credit, I shall not say much. It was admitted that this guarantee could not form the subject of a set-off; but *Olive v. Smith* was referred to for the purpose of showing that it might operate as a mutual credit. The case of *Olive v. Smith*, however, such as it was, is very distinguishable from the present case; for, there, the goods were placed with a broker for the purpose of being sold, and when sold, the sum received would certainly form an item in his account: here, the only

(a) In *Cumming v. Forester*, 1 M. & S. 499.

mutual trust is of a very different description. The bankrupt has been trusted with a scheme of the defendant's, and they enter into an undertaking resting on a contingency. There is no case which calls such a trust a mutual credit, and the case of *Glennie v. Edmunds* 4 Taunt. 775, entirely rules the present.—There it was held that an undefrwriter could not establish as a mutual credit with the assured a loss accruing after the bankruptcy of the assured;—so here, *the loss incurred by a contingency after the bankruptcy of Cook, cannot be considered as a mutual credit existing between Cook and the defendant at the time of his bankruptcy. But, independently of *Glennie v. Edmunds*, to call this a mutual credit would be to go far beyond any cases which have been hitherto decided.

PARK, J. I am of the same opinion. If the persons levying the execution had known of the act of bankruptcy, the statute 49 G. 3, would not apply; but, as it is, there never was a case to which the statute more fully applied. The express object of it was to protect executions such as these. With respect to the mutual credit, the statute 5 G. 2, c. 30, s. 28, enacts, "that where it shall appear to the commissioners, or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall be due on either side on the balance of such account, and on setting such debts against one another, and no more shall be claimed or paid on either side respectively." It would be to be wished that such credit should be strictly confined to pecuniary transactions; it is, however, too late to lament the extension of such credit, since the case of *Ex parte Deezee*, 1 Atk. 228, though it may be said that the principle is carried quite far enough in that case. Whether *Olive v. Smith* has met with the approbation of Westminster Hall I will not now say; but this point was much considered in the case of *Rose v. Hart*, determined in this court in Trinity term, 58 G. 3. The result of the decision in that case was, that the doctrine of mutual credit might be extended to cases where the property would form an item in a future account between the parties, but not to cases where there is a mere deposit of property; and I do not feel disposed to vary from that decision.

BURROUGH, J. The answer to the objection touching the description of the goods is sufficiently furnished by the stat. 49 G. 3. But the allegation would have been sufficient without that statute; for, at the time of levying the execution, the goods were the property of Cook. At all events the statement, that the goods were taken as and for the goods of Cook, is a correct statement of the fact. As to the mutual credit, *French v. Fenn*, Co. B. L. 7th ed. 536, and *Rose v. Hart*, have decided the question. In *French v. Fenn*, Cox, the bankrupt, was indebted to Fenn, and had intrusted him with his share or interest in a string of pearls to be sold by Fenn, and the profit on such share was to be paid to Cox; Fenn sold the pearls after Cox's bankruptcy, and Cox's assignees brought an action against Fenn for Cox's share of the profit; on the part of the defendant it was insisted, that there was a mutual credit, though not a mutual debt, at the time of the bankruptcy, and that one could not be demanded without satisfying the other. Lord MANSFIELD, in that case, said, "The act of parliament is accurately drawn to avoid the injustice that would be done if the words were only mutual debts, and it therefore provides for mutual credit. In this case credit is given to the defendant for a row of pearls which is to belong in thirds to three persons. As Fenn advanced the whole money, the other two were to pay him interest for their shares till the pearls were sold; there is no doubt there was a mutual credit. Cox had trusted him with the pearls, and he had trusted Cox with other goods, which, in all probability, he would not otherwise have done." In *Rose v. Hart*, trover was brought

oy the assignees of Smart, a bankrupt, for cloths left by Smart, before his bankruptcy, with the defendant, who was a fuller, to be dressed. There was then a balance due from the bankrupt to the defendant for work done on other cloths. The assignees tendered to the defendant the sum due for work done on the cloths in his possession, and demanded them from him; but the defendant refused to deliver them up, unless he was paid his general balance. The question was whether he was entitled to retain them for that balance; and HOLROYD, J., before whom the cause was tried, at Sarum Spring assizes, 1818, reserved the point for the opinion of this court. We had, I remember, several meetings on the subject, and the opinion of the court was, that the defendant, who received these cloths for the purpose of dressing only, had no right to detain them for his general balance. Lord Chief Justice GIBBS, in the course of delivering that opinion, after reading the 28th section of the statute 5 G. 2, c. 30, said "Something more is certainly meant here by mutual credit than the words mutual debts import, and yet upon the final settlement it is enacted merely that one debt shall be set against another. We think this shows that the legislature meant such credits only as must in their nature terminate in debt; as where a debt is due from one party and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt; or where there is a debt on one side and a delivery of property with directions to turn it into money, on the other." These two cases taken together explain the intention of the statute. The intention was to confine mutual credit to pecuniary demands, or to those subjects, which at some subsequent time might become of a pecuniary nature.

*97] Now, look at this case. Has it the semblance of a pecuniary demand? It is a mere guarantee, on which there is only a contingent claim for unliquidated damages; and here, before verdict given, is an attempt to call it a mutual credit. I think that there was no ground for the objection made at the trial, and that this rule must be discharged.

RICHARDSON, J. I am of the same opinion. For all the purposes of this question the statute 49 G. 3, renders these goods the goods of Cook, and the assignees cannot invalidate the execution. With regard to the question of mutual credit, the statute 5 G. 2, considers credit and debt as something in the nature of an account which may be set against some other account. That statute, however, has been held to extend to a deposit of goods, but by the last decision the doctrine has properly been confined to goods deposited with a view to a sale, the proceeds of which should form an item in an account. The present case goes much farther, for it is only a contract to indemnify upon a contingency, and *Glennie v. Edmunds* is directly opposed to such an extension of the doctrine of mutual credit.

Rule discharged.

*98] *DANIEL EDGE, Defendant, SAMUEL TAYLOR, Tenant, WILLIAM WARREN and Wife, Vouchees.

The court allowed the writ of entry in a recovery suffered 56 G. 3, to be amended by altering the names of the parties, on affidavit that the recovery was intended to be suffered according to the amendment prayed, and that all the parties were living and consenting to the motion.

This recovery was suffered in Michaelmas term, 56 Geo. 3. And Vaughan, Serjt., now moved, that the writ of entry be amended by altering the names of the parties as follows, viz. Thomas Harris, defendant, Daniel Edge, tenant, William Warren and wife, vouchees, on an affidavit which stated that the parties were so intended to be named by the deed to make a tenant to the praecipe, that, by mistake, the recovery was suffered with the wrong names, and that all the parties were living and consenting to the motion. He cited

many instances where such an amendment had been allowed, from Pigott on Fines and Recoveries, 170.(a)

The court after some little hesitation, allowed the amendment.

(a) See also Cruise's Digest, vol. v. pp. 436, & 160; *Lord v. Briscoe*, Barnes, 24.

*TEAL v. AUTY and DIBB.

[*99]

Defendants were sued for the price of some growing trees, which they had purchased, cut down, and carried away; a witness proved an admission by one of them that something was due, and a promise to pay. At the time of the bargain, written memoranda had been made of the transaction; but these memoranda, (one of them an item in a book of accounts,) being neither stamped nor signed with the names of the parties, were not produced in evidence, and the plaintiff was nonsuited: *Held*, that the nonsuit was proper.

Assumpsit for the price of some poles, which defendants had purchased when growing, and had afterwards cut and carried away. The declaration contained also a count upon an account stated. At the trial before BAYLEY, J., (York Spring assizes, 1820,) it appeared that written memoranda had been made of the transaction at the time of the bargain. These memoranda (one of them an item in a book of accounts) being neither stamped nor signed with the names of the parties, were not produced in evidence. A witness stated that Auty, after the poles were carried away, admitted something to be due, and promised to pay. The learned judge directed a nonsuit.

Hullock, Serjt., having obtained a rule *nisi* to set aside this nonsuit, and have a new trial,

Vaughan, Serjt., showed cause against the rule. The nonsuit was proper, because this transaction having been accompanied with a writing, no parol evidence was admissible till that writing was produced:—but the writing was inadmissible on two grounds: first, as having no stamp; secondly, as not containing the names of the parties to be charged; which it ought to have done, pursuant to the statute of frauds, the growing trees being an interest in land. *Waddington v. Bristow*, 2 B. & P. 452; *Emmerson v. Heelis*, 2 Taunt. 38; *Crosby v. Wadsworth*, 6 East, 602.

Hullock, in support of his rule. It is not necessary for the plaintiff to impeach any of those cases. If a *parol contract, touching an interest in land, be not executed, the party cannot enforce it unless he have a memorandum in writing, signed by the person to be charged, as well as by himself: but where the contract is executed, such evidence of it is no longer necessary; it is sufficient, if, as here, the purchaser has cut down his poles and carried them away. The plaintiff here, has established his claim by evidence *alibi* and independent of the writing, and he is entitled to have at least a nominal verdict upon the evidence given as to the account stated. *Knowles v. Mitchell*, 13 East, 249. Then there was no agreement here, for the memorandum without signature does not constitute an agreement under the statute of frauds for any interest in land; and, if the memorandum was no agreement, there could be no ground for stamping it.

Sed per Curiam. The learned judge who directed this nonsuit was perfectly right, and on that subject we feel no difficulty. But, adverting to the facts of this case, we find it to have been originally an agreement for the purchase of an interest in land, namely, growing poles; if, therefore, an action had been brought to enforce such a contract, the objection that the memorandum attesting it was not signed by the parties and stamped, would have been well founded: here, however, there are other circumstances, and, whatever the original agreement might have been, the poles were taken away and the agreement was executed; and if the plaintiff could have proved the amount due to him by any other evidence, there might have been no necessity for referring to the original agreement. We need not refer to a variety of cases, where upon an ex-

cuted agreement the party has been entitled to recover, although he could never *have prevailed had the contract been contested before it was executed.
 *101] Here it is contended that the plaintiff is entitled to recover upon the account stated; but the witness called to prove that, did not speak to an admission of any definite amount, and in the case referred to, a promise for a precise sum was proved. The promise to pay in the present case was probably made with reference to the written memorandum, but that, not being stamped, could not be admitted in evidence. The difficulty, in this case, is to ascertain what was due; and, in the absence of proof to such effect, the direction for a nonsuit was proper. However, under the circumstances of the case, we think the plaintiff ought to be permitted to go down to trial on payment of costs: and, if on inquiry of the learned judge who tried the cause, it should appear that the witness spoke to an admission of a definite sum, the plaintiff would be entitled to a verdict.

The court afterwards said that the learned judge who tried the cause had no recollection of the admission of any definite sum being due, but they still thought that the plaintiff ought to have a new trial upon the terms above mentioned.

Rule for a new trial absolute, on payment of costs.

*102] *SAMUEL KNIGHTS, Administrator, v. FRANCIS THOMAS QUARLES, Gent.

Plaintiff, as administrator, declared in *assumpsit* that defendant, for certain fees to be paid him by intestate, undertook as attorney to investigate and see that a title about to be conveyed to intestate was a good one: breach, that he omitted to do so, and that intestate in consequence took an insufficient title, whereby his personal estate was injured. Defendant having demurred, the demur-
rer was overruled.

ASSUMPSIT. The declaration stated that before the time of making the promise therein contained, and in the life-time of the deceased, the deceased had contracted with one Savory, for the purchase of certain premises at Thetford, which Savory assumed to have sufficient power and title to sell and convey to the deceased; and thereupon, in the life-time of the deceased, (in consideration of the premises, and that the deceased, at the special instance and request of the defendant, had retained and employed the defendant as his attorney and solicitor, to ascertain and investigate the title of Savory to the said premises, and to cause and procure the same, and a good title thereto, to be duly and effectually conveyed by Savory to the intestate as purchaser, for certain fees to be therefore paid by the intestate to the defendant,) the defendant undertook and promised the deceased, in his life-time, to perform and fulfil his duty in the premises. Breach, that although it was the duty of the defendant by virtue of his retainer, to investigate carefully the title of Savory to the premises, and to take due and proper care that a bad title to the same should not be accepted by the deceased, yet the defendant, not regarding his duty in that behalf, but contriving and fraudulently intending, &c., did not nor would carefully investigate the title of Savory in the premises, or take due or proper care that a bad or insufficient title was not accepted and received by intestate, but on the contrary the defendant wholly neglected and refused to do so; and in the life-time *103] of the deceased, the defendant, in violation of his promise "and under-taking, caused and procured, &c., the deceased, without his knowledge or consent, to accept and receive, and the said deceased, in his life-time, did accordingly accept and receive from Savory a bad, defective, and insufficient title to the said premises; and thereupon such title was conveyed by Savory to the deceased in his life-time, and the deceased paid Savory as the consideration-money in that behalf, 2000*l.*, by means of which the deceased, in his life-time, and until his death, held the premises on a bad and insufficient title, and was,

in his life-time, wholly unable to sell or dispose of the same. The count then alleged special damage to the deceased and his personal estate. The declaration contained other counts, varying the statement of the contract, in one of which counts, the defendant was charged generally, and not as an attorney. To these counts the money counts were added.

Demurral and joinder.

Doyly, Serjt., for *Blosset*, Serjt., in support of the demurrer. This action, though in form *ex contractu*, is, in substance *ex delicto*, the breach of promise complained of, being no more than a tort arising out of a neglect of duty. In proof of this, it may be observed, that the action against parties for negligence or ignorance in a profession, has uniformly been conceived in case, and a plaintiff cannot, by varying his form of action, vary also his rights. Then it is clear that an action by the representatives of the deceased for a mere wrong committed against the deceased and unaccompanied with any breach of contract, does not lie, unless that wrong immediately affect his personal estate, *Lucy v. Levington*, 2 *Levintz*. 26; as, for instance, a conversion of goods in the life-time of the deceased. If the law were otherwise every case of deceit might be converted into an implied *assumpsit*, *and parties be enabled to sue in cases where it has been clearly held, that the action dies with the deceased. [*104 But, supposing that by a forced construction the duty of the defendant in this case could be called a contract; at all events it is an implied contract, and though an action will lie against an executor for breach of the express contract or covenant of his testator, the law has been considered otherwise with respect to an implied contract. This, too, is a contract regarding land, and the heir should have sued, not the administrator. The declaration is defective in not alleging, that it was the defendant's profession to ascertain the title of estates; and if it was not, he incurred no liability; for it was the plaintiff's folly to employ an incompetent person.

The Court stopped *Frere*, Serjt., who was to have argued for the plaintiff, expressing a unanimous opinion that there was no ground for the demurrer, an express promise being alleged, a breach of it in the life-time of the intestate, and an injury to his personal property, the truth of which allegations was admitted by the demurrer; that it made no difference in this case whether the promise were expressed or implied, the whole transaction resting on a contract; that though, perhaps the intestate might have brought case or *assumpsit* at his election, *assumpsit* being the only remedy for the administrator, it was very necessary the action should be maintained or the defendant might escape out of the consequences of his misconduct, and the intestate's estate suffer an irreparable injury. It was farther observed, that if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured,—though it was clear, he, in his life-time, might, at his election, sue the coach proprietor in contract or in tort, it could not be doubted that his executor might *sue in *assumpsit* for the consequences of the coach [*105 proprietor's breach of contract. That it could not be pretended that the contract of the defendant in this case was a contract running with the land; but if it were so, an action would lie by the administrator for a breach and damage incurred in the time of the testator; and as to the alleged omission of certain averments in the declaration, respecting the defendant's profession, at all events, the admission of an express promise, implied by the demurrer, rendered any such allegation unnecessary.

Judgment for the plaintiff.

PHILLIPS and CAREY, Defendants, **NOUNE**, Tenant, **LISLE**, Vouchee; **AVERY and PHILLIPS**, Defendants, **WHITAKER**, Tenant, **LISLE**, Vouchee.

By a deed to lead the uses of a recovery suffered in Trinity term, 1 W. & M., M. L. and E. L. conveyed to J. N., to make him tenant to the *præcipe*, all the manors and farms of B. and C. then in the occupation of M. L., her tenants and assigns, and all other the manors, messuages, services, rents, lands, tenements and hereditaments, in the county of S. and isle of W. of them, M. L. and E. L., or either of them: By a deed to lead the uses of a recovery suffered in Hilary term, 13 G. 1, M. L. and E. L., son of E. L., conveyed the before-mentioned hereditaments and prenises to D. W., to make him tenant to the *præcipe*: The tithes had been enjoyed with the lands, since the time of James the First: The court refused to amend these recoveries by inserting the word *tithes*.

Pell, Serjt., moved to amend two recoveries, one suffered in Trinity term, 1st Wm. & Mary, and the other in Hilary term, 13 Geo. 1, by inserting the word *tithes*.

By the deed to lead the uses of the first recovery, Dame Mary Lisle and Edward Lisle conveyed to John Noune to make him tenant to the *præcipe* in such recovery, all those the manors and farms of Briddlesford and Chilerton, and Briddlesford woods, then in the occupation of Dame Mary Lisle, her tenants and assigns, and all other the manors, messuages, services, rents, *106] *lands, tenements, and hereditaments, in the county of Southampton, and isle of Wight, of them the said Dame Mary Lisle and Edward Lisle, or either of them.

By the deed to lead the uses of the second recovery, the said Mary Lisle and Edward Lisle, son of the said Edward Lisle, conveyed the before-mentioned hereditaments and prenises to Daniel Whitaker, to make him tenant to the *præcipe* in such recovery.

The tithes of the lands in question, as well as the lands, were granted by James the First to Francis Morris and Francis Phillips: Morris and Phillips, (as appeared by the recital of an indenture made between Sir Thomas Flemynge and John Earlisman of the one part, and Thomas Lysle of the other part,) conveyed them in 1610 to Flemynge and Earlisman, and Flemynge and Earlisman conveyed them the same year to Thomas Lysle, an ancestor of Edward Lisle the father, before-mentioned.

From the time of the grant of the crown to the year 1775, the tithes had been enjoyed with the lands, and in 1775 were conveyed, together with the farm at Briddlesford, by James Barton to Joseph Tarver and William Hearne. Hearne afterwards conveyed his moiety to Tarver, and Tarver conveyed the whole to Hunt. Tarver never paid tithes.—A purchaser to whom Hunt sold the property, objecting to the omission of the word "tithes" in the recoveries of 1 Wm. & Mary, and 13 G. 1.,

Pell, contended that the word *hereditaments* in the respective deeds to lead the uses of those recoveries, was sufficiently comprehensive to include tithes under the circumstances above mentioned, and to warrant the amendment prayed for. He cited *Cullum*, defendant, *Ryder*, tenant, *Vernon*, vouchee, 7 Taunt. 341; *Corden*, defendant, *Hall*, tenant, *Colclough*, vouchee, 2 N. R. 431; and *Collier*, defendant, *Lord Chesterfield*, vouchee, 4 Taunt. 226.

*107] *But the court thought, that there was no satisfactory ground to show, that the parties to the recoveries in the time of William and Mary and George the First, were in possession of the tithes, and

Refused the amendment.

EDMUND TURNOR, Esq. v. TURNER, Clerk.

1. A declaration on a replevin bond (conditioned for the plaintiff in replevin to appear at the county court and prosecute his suit with effect, and make a return of the cattle, goods, &c. distrained, if a return should be adjudged) after alleging that the plaint was removed into the court above, that the defendant avowed, and that plaintiff in replevin having omitted to plead to the avowry, a judgment for a return was awarded, averred, that the plaintiff in replevin did not prosecute his suit with effect. A plea, that, after the judgment for a return, a writ to inquire of the arrear of the rent and the value of the cattle, goods, &c. distrained, was prayed by the avowant, granted, and executed, and that thereupon avowant had judgment to recover the arrear of rent found, together with a sum for his costs and damages, was held ill, on demur.
2. Sureties in a replevin bond are not discharged by the execution of a writ of inquiry, under 17 Car. 2, c. 19, s. 23, and a judgment thereon for avowant to recover the arrear of rent found, together with a sum for his costs and damages.

This was an action on a replevin bond, brought by Edmund Turnor, assignee of the sheriff, against Samuel Turner, one of the sureties in the bond; the condition of which bond was, that Jonathan Watmough should appear at the county court, on the 22d February then instant, and prosecute his suit with effect against the said Edmund Turnor, for taking and unjustly detaining his cattle, goods and chattels, and make a return thereof, if a return should be adjudged. The declaration stated, that E. T. distrained the cattle, goods, and chattels of Jonathan Watmough, for rent due, that the sheriff replevied, and delivered the said cattle, goods and chattels to Jonathan Watmough, who afterwards appeared, and levied his plaint against E. T., for taking and unjustly detaining his cattle, goods, and chattels, and found pledges as well for prosecuting the said plaint, as for returning the said cattle, goods, and chattels, if return should be adjudged; that this plaint was removed into this court, and that thereupon the said Jonathan Watmough *complained against E. T. for taking and unjustly detaining his cattle, goods, and chattels in a certain dwelling-house, and [*108 thereupon E. T. avowed the taking for rent *arrere*, and that Jonathan Watmough, not pleading in bar to such avowry, it was considered by the court, that he should take nothing by his said plaint, but that he and his pledges should be in mercy: that E. T. should have a return of the said cattle, goods, and chattels. Then the declaration averred, that Jonathan Watmough did not prosecute his suit with effect, whereupon the sheriff assigned the bond to the plaintiff. The defendant pleaded in bar, that, after the said judgment in Trinity term, 55 G. 3., the said E. T. prayed the writ of the king to the sheriff of Lincoln, to inquire of the arrear of the rent, and the value of the cattle, goods, and chattels so distrained, which writ was granted and executed, and the inquisition thereupon was returned, that 367*l.* 10*s.* was due for rent, and that the cattle, goods, and chattels were worth that sum: and that thereupon E. T. had judgment against Jonathan Watmough, to recover the said sum, and 79*l.* 5*s.* for his costs and charges; and that E. T. should have execution thereof. To this plea the plaintiff demurred. This demurral was argued in Easter term last.

Blossett, Serjt., in support of the demurral.—The plea does not answer the breach; when a bond is given to prosecute with effect and to make a return, a plea which does not aver a prosecution with effect as well as a return, is ill; where there is an obligation conditioned to do several things the obligation is forfeited on the breach of one. What damages the plaintiff may or may not have sustained by breach of the condition to prosecute with effect, is quite another consideration; if he has sustained none, that will appear on the writ of inquiry, but the object of this bond is, to secure the costs as well as the [*109 rent; all the conditions of the bond are distinct and independent; this is laid down by Lee, C. J., in *Morgan v. Griffiths*, 7 Mod. 380. “In all replevin bonds there are several independent conditions; one to prosecute, another to return the goods replevied, and a third to indemnify the sheriff; and a breach may be assigned upon any of these distinct parts of condition.” The first condition to prosecute with effect was introduced by statute, as a remedy for the te-

dious proceedings against pledges.—The condition to make return, was introduced from the custom of taking pledges *de retorno habendo*, which were wholly distinct from the pledges for prosecution. There are cases in which a breach of one of the conditions of a replevin bond has been deemed a sufficient cause of action without alleging any breach of the other. *Vaughan v. Norris*, Cas. Temp. Hardw. 137; *Dias v. Freeman*, 5 T. R. 195; *Gwillim v. Holbrook*, 1 B. & P. 410. The legal meaning of the term prosecuting with effect is prosecuting with success, as the object of the condition is to secure the party's costs. This is clear in the case of pledges on other actions, (a) as well as in replevin; (b) *Ormond v. Bierly*, Carth. 510. It appears, also, from the determinations on the stat. 4 Ann. c. 16, s. 16, as to the making of an entry or claim to avoid a fine, upon which an action must be commenced within a year and prosecuted with effect. (c) Whatever effect, therefore, the judgment to make a return, and the return itself, may have towards satisfying the condition for a return, it can have none towards satisfying the condition to prosecute with effect; *Cooper v. Sherbrooke*, 2 Wils. 117; *Baker v. Lade*, Carth. 253; which was intended to give the landlord security for his "costs against a vexatious tenant. *Yea* [110] *v. Lethbridge*, 4 T. R. 433; *Page v. Eamer*, 1 B. & P. 378.

Cross, Serjt., contrâ. The conditions of the bond are in the alternative; either that the party shall prosecute with effect, or that he shall make a return.

If it were otherwise, the defendant, though satisfied by a return, might go on for damages. In all the cases where after a return has been adjudged, the avowant has sued for an omission to prosecute with effect; the return, though adjudged, was never made, so that the party was without any satisfaction. After judgment for the defendant, by the common law, a writ *de retorno habendo* was awarded, (d) and before the party calls on the sureties, he should endeavour to obtain a return. Instead of that, he waives the benefit of the judgment for a return; and he takes the benefit of the stat. 17 Car., by suing out a writ of inquiry: Upon this writ he enters up judgment for damages, and entitles himself to an execution by *f. fa.* This execution would give him all the goods he could have taken under the judgment for a return, and all the other goods of the plaintiff too: so that the judgment for a return, is merged in the judgment upon the writ of inquiry. *Cooper v. Sherbrooke* is in point, and it is laid down in the books of practice, that where a party sues out a writ of inquiry under 17 Car. 2, he cannot afterwards go against the pledges. (e) At all events the declaration is bad, for it does not show that the party did not prosecute with effect; it shows that the judgment was entered up for a return; and when that was done there was an end of the suit. The allegation should have been, that no return was made; all the precedents are so either that the party did not prosecute with effect, because no judgment was arrived at, or that there [111] was a judgment, but no return.

Blossett, in reply. It appears from *Cooper v. Sherbrooke*, that even where there is a judgment for a return, an inquiry may be had under 17 Car. 2. It is not necessary, therefore, to show that no return has been made. The declaration here is the same as in *Dias v. Freeman*, and the judgment itself, or the sort of judgment, makes no difference in the case, the only question being whether the party has prosecuted with success. *Baker v. Lade* shows, that the judgment under 17 Car. 2, is cumulative, and does not affect the common law. No case is cited in Tidd, and he only states, that, if a party has a judgment and an inquiry, he cannot sue on the breach for not returning: but this position does not affect the breach for not prosecuting with effect.

Cur. adv. vult.

(a) Carth. 519, *per Holt, C. J.*

(b) Gilb. Replevin, 95.
(c) See Adams on Ejectment, 93, 94, last ed.

(d) Tidd. 1081, 6th ed.

DALLAS, C. J., having stated the case and pleadings, as above set forth, now delivered the judgment of the court.

The question which the court has to decide is, whether this plea is a good bar to the plaintiff's action, which action is against one of the sureties in the replevin bond, the condition of which is set out in the declaration; and it appears to have been that Jonathan Watmough should prosecute his suit with effect against the said Edmund Turnor, for taking and unjustly detaining his cattle, goods, and chattels, and make a return thereof if a return should be adjudged. We think the condition of the bond was broken; by the plaintiff in replevin becoming nonsuit he has not prosecuted his suit with effect. Although it appears by the declaration, that a return of the cattle, goods, and chattels was awarded, yet we think the avowant had his election, whether he would proceed by a writ *de retorno habendo*, *or by the course which he has pursued, namely, [*112 the issuing of a writ of inquiry under the statute of Charles 2.

If the court were to decide, that this plea was a good bar to the plaintiff's action, it would follow, that the avowant or person making cognizance for rent, would not derive from the sureties in the replevin bond, the benefit which was intended to be given to them by the statute 11 Geo. 2, c. 19, s. 23.

The statute 17 Car. 2, c. 7, s. 2, enacts "that wheresoever a plaintiff in replevin shall be nonsuit before issue joined, the defendant making a suggestion in nature of an avowry or cognizance for the rent, to ascertain the cause of distress, the court, upon his prayer, shall award a writ to inquire by a jury touching the sum in arrear at the time of the distress and the value of the goods taken, and, upon the return of the inquisition, the defendant is to have judgment to recover against the plaintiff the arrearages of such rent, in case the goods distrained shall amount to such value;" and similar provisions are made where the plaintiff becomes nonsuit after cognizance or avowry made, as this case was.

The parties to the replevin suit are the person whose goods are distrained and the person making the distress. Previous to the statute 11 Geo. 2, if he, whose goods were distrained, was a person of little worth, so that the avowant or person making cognizance for rent could have no fruit of his judgment on the inquisition under the statute Car. 2, he was driven to an intricate proceeding against the sheriff, if he had not taken sufficient pledges, which, by former statutes he was directed to do, or to a proceeding in the sheriff's name against the pledges taken by the sheriff, if he had taken a bond from the pledges.

Great delays and inconveniences attending this course of proceeding, the legislature, in the eleventh year of the *reign of George the Second, to prevent (as the statute says) vexatious replevins of distresses taken for rent, [*113 enacted, "That all sheriffs and other officers having authority to grant replevins, may and shall, in every replevin of a distress for rent, take in their own names, from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained (such value to be ascertained by oath of one or more credible witnesses,) and conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods distrained, in case such return shall be awarded before any deliverance be made of the distress; and that such sheriff or other officer taking any such bond shall, at the request and costs of the avowant, or person making cognizance, assign such bond to the avowant, or person aforesaid by endorsing the same," (in the manner mentioned in the act.) And the act then provides that, if the bond so taken and assigned be forfeited, the avowant or person making cognizance, may bring an action and recover thereupon in his own name.

It is quite clear from the language of this act, that the legislature meant to give the avowant, or person making cognizance, a further and additional security, and to place him in a better situation than he was in under the law as it then stood. But this act has another wise provision; for, the framers of the act, fearing that

this indulgence might be used vexatiously, have introduced this clause, namely, that the court, where such action shall be brought, may, by a rule of the same court, give such relief to the parties upon such bond, as may be agreeable to justice and reason, and such rule shall have the nature and effect of a defeasance to such bond.

If the plea had stated, that an execution had issued on the judgment, and the sum recovered had been levied *and paid to the avowant before this action was commenced, the case would have come before us in a very different shape. It is sufficient to say that this is not alleged. We think that this action is well brought, and that the plea is no bar to it. If the action shall be enforced, so as to work injustice, the defendant has a plain remedy, under the statute 11 Geo. 2, by an application to this court for relief.

Judgment for the plaintiff.

IN THE EXCHEQUER CHAMBER.

MONKHOUSE, WRIGHT, and FAIRBAIRN, v. HAY and Others, Assignees of MATTHEWS, a Bankrupt. In Error.(a)

1. A trader assigned a ship to A. in trust, to pay a debt due from the trader to A. and his partners, but with their permission retained the possession and disposition of the ship at the time of his bankruptcy: *Hold*, that the ship passed to the assignees under the commission of bankruptcy, by virtue of the 21 Jac. 1, c. 19, s. 11, although before the act of bankruptcy the register was endorsed to A., and shortly afterwards (three months before the issuing of the commission) the ship was newly registered in his name, and continued so registered at the time the commission was issued.—2. The 21 Jac. 1, c. 19, s. 11, is not repealed as to shipping, by the ship register act.

Assumpsit for money had and received by the defendants below, (plaintiffs in error) to the use of the plaintiffs below, (defendants in error;) assignees of Thomas Matthews, a bankrupt. A special verdict found the following facts. Matthews the bankrupt, the registered owner of a ship called 'The Dolphin', being indebted to the defendants below, by indenture (reciting the certificate of the registry of the ship) dated the 22d November, 1815, assigned the ship, then at sea, to the defendant, Fairbairn, as a security for the debt of himself and his *115] *co-partners, the other defendants below; the ship to be sold if the debt was not paid in a certain time. The deed contained a covenant by Fairbairn, to re-assign the ship to the bankrupt, on payment of the debt before the sale; and, that, until the ship should be sold under the deed, the bankrupt was to be permitted to have, hold, and enjoy the same, and to receive and take the gains and profits for his own use and benefit. A copy of this deed was delivered, on the 22d November, 1815, to the proper officer of the custom-house at Sunderland; the ship returned a few days afterwards: on the 29th of November, 1815, the proper endorsement was made on the certificate of the registry, and on the 31st January, 1816, Fairbairn obtained a new register in his own name. At the time of the execution of the assignment, the bankrupt had the possession of the ship, and continued from that time, until the 1st of June, 1816, to exercise all the acts of ownership, by appointing captains, despatching the ship on voyages in January and April, 1816, and from time to time repairing and insuring her at his own expense; but she was navigated under the certificate of registry, which had been granted to Fairbairn, in compliance with the register acts. The defendants below never interfered in any way with the conduct or management of the ship until the 1st June, 1816, when, on the return of the ship from a voyage on which she had been chartered by the bankrupt in April, 1816, they took possession of the same, displaced the master from his

(a) See 2 B. & A. 193.

command, and re-appointed him under themselves. On the 11th of May, 1816, a commission of bankrupt had issued against Matthews, who had committed an act of bankruptcy, in December, 1815. The demand of the defendants below upon the ship, had been reduced by payments to 595*l.*, and the clear proceeds, remaining in their hands after the sale, amounted *to 585*l.*, but whether, [*116 &c. Judgment for the plaintiffs below.

Parke, James, for the plaintiffs in error. 1st. Since the passing of the register acts, the stat. 21 Jac. 1, c. 19, s. 11, does not apply to British ships. 2d. Enough is not found on the verdict to entitle the defendants in error to recover.

Upon the statute of James the mere possession of the bankrupt, even at the time of bankruptcy, *Jones v. Dwyer*, 15 East, 21, does not entitle the assignees to recover, unless he has also the reputed ownership in the thing possessed, and has taken on himself the disposition of it, as owner: in *Lingham v. Biggs*, 1 B. & P. 87, *EYRE*, C. J., says, "Being allowed to have the possession of goods under circumstances which give the reputation of ownership, brings the case within the statute. The possession, therefore, must be accompanied at least with the apparent power of selling: but, since the passing of the registry acts, 26 G. 3, c. 60, 34 G. 3, c. 68; British registered ships cannot be transferred without an accompanying documentary title: apparent possession is not that which entitles the possessor to pass them, as in the case of ordinary goods. *Ex parte Yallop*, 15 Ves. Jun. 60. This case resembles that of a chattel interest in land, which has been held not to be within the statute, *Ex parte Marsh*, 1 Ves. Sen. 352, and the judgment of *BURNET*, J., in *Ryall v. Rolle*, 1 Atk. 168; shows why: "As to the possession of the goods, I have no way of coming at the knowledge of the owner, but by seeing who is in possession of them, but the possession of land is of a different nature, for a man may be in possession of land as tenant at will, as a mortgagee is to the mortgagor before *the condition broken. A purchaser may call for the title deeds and need not be deceived unless he will." So *Lord KENYON* says, in *Gordon v. East India Company*, 7 T. R. 284; "The case of real property is in a different situation; no purchaser is satisfied with the mere possession of an estate; before he purchases he calls for the title deeds, and examines whether or not the possessor is entitled to the estate; but the possession of personal property is generally the title on which the world relies."—The court will not extend the statute of James, because it is productive of many hardships, and though it might have been useful when the operations of trade were few and simple, the case is very different now, when apparent possession does not confer the credit which it used to do.

Secondly, the jury have not found the reputed ownership to be in the bankrupt, and, unless they do so, the defendants in error can have no right to recover: it was said by *EYRE*, C. J., in *Lingham v. Biggs*, "It was well observed by Mr. Justice BULLER, in *Walker v. Burnell*, that questions on the 21 Jac. have much more of fact than of law in them." It may be admitted, that, if the jury find a fact or facts to which no other fact is opposed, the court may be left to draw an inference; but here the jury find conflicting evidences of ownership, and omit to strike the balance between them. If a ship were let for years, as in *Frazer v. Marsh*, 2 Campb. 517, the jury would be bound to decide in whom was the reputed ownership at the time of the bankruptcy, and they are equally bound to do so in the present case. In *Muller v. Moss*, 1 M. & S. 335, *Lord ELLENBOROUGH* says, "Reputed ownership is a fact which ought to have been found."

**Tindal*, for the defendants in error.—As to the second point, in all the cases on this subject, there has been a mixture of fact and law, and [*118 it has been left to the court to decide, whether, under the facts, the reputed ownership was in the bankrupt. If the jury find the reputed ownership to be

in him, no question can be left for the court; therefore, taking the special verdict as it now stands, there is enough to entitle the defendants in error to recover.

As to the first and main point, this case falls within the statute of James, unless the ship register acts operate as a repeal of that statute as far as ships are concerned. But the ship registry acts relate to objects entirely different from the objects of the statute of James. The object of the registry acts being to exclude the competition of foreign shipping, that of the statute of James to prevent false credit. Then, the possession and management of the ship continued by the bankrupt so long after the transfer, is a sufficient reason for calling this a case of reputed ownership. It is contrary to daily experience, that parties who supply a ship with necessaries, should have recourse to the documentary title; the person who puts himself forward as apparent owner, is the person charged, and liable upon evidence that he has acted in such a capacity. It would be a great inconvenience, therefore, if the reputed owner should not be responsible to such claimants.—As to chattel interests in land, they are, clearly, not within the purview of the statute.—The register acts do not affect titles, passing by operation of law, as to executors or administrators, in case of death, or to assignees generally in case of bankruptcy. In these cases a title may be transmitted without any of the forms required by statute; there is no reason, therefore, why it may not be so transmitted in a particular case falling within the *119] operation of the statute of James; and there never ^{*}was one which came more completely within the spirit and very language of that act than the present, the deed containing all the expressions employed in the statute. In *Ex parte Matthews*, 2 Ves. Sen. 272, Lord HARDWICKE says, "A mortgage may be made of a ship at sea; and if mortgagee takes all methods in his power to get the possession, such as bill of sale, &c., it will be out of the statute of Jac. 1, as was held in *Brown v. Heathcote*; which case was taken notice of in *Ryal v. Rowles*; otherwise no security could be made of a ship at sea." If indeed the ship continues at sea, the case does not seem to fall within the provisions of the statute, but if it returns, the statute immediately applies. *Ex parte Batson*, 3 Bro. Ch. Ca. 362. In *Ex parte Yullop*, the court did not give any decisive opinion against the doctrine contended for, and in *Mestair v. Gillespie*, 11 Ves. Jun. 645, the master of the rolls expressly recognises it; *Robinson v. M'Donnel*, Selw. N. P. 1142, is expressly in point, and though now to be reconsidered, may be cited for the language and opinion of Lord ELLENBOROUGH.

Parke, in reply. *Robinson v. M'Donnel* and *Hay v. Fairbairn*, 2 B. & A. 193, are now to be reconsidered by the court, and the other authorities do not come up to the point of the present case. The clause of the deed which enables the bankrupt to retain the ship, does not and cannot enable him to hold himself out as reputed owner, for every one is able to inspect the register. If the ship had been let, and the lessee had become bankrupt, that would not have been conclusive on the true owner, and this case does not differ from the case of a lessee.

*120] *DALLAS, C. J.* The general question, here, is, whether the ship Dolphin was in the possession, order, and disposition of the bankrupt at the time of the bankruptcy, with the consent and permission of the true owner and proprietor; and two objections have been urged against the claim of the defendants in error to this ship; one, that the reputed ownership should have been found by the jury,—that it has not been found,—nor have facts been found on which the court could infer any such reputed ownership;—the other, that the possession of the bankrupt at the time of the bankruptcy could not constitute a reputed ownership under the statute of James, inasmuch as by the register acts no one can be reputed owner but he who is registered as such.

Upon the effect of possession by the bankrupt at the time of the bankruptcy, with respect to reputed ownership, the facts are such (here his lordship stated the facts of the case) that it is impossible to conceive a stronger case of appa-

rent ownership, continuing up to the time of the bankruptcy: but, independently of this, and as far as the conduct of the assignees could affect it the property, here, would pass to them; for, at the period when the commission was sued out, the ship was on a voyage; and in every case of a transfer of a ship at sea, the assignee must do, not that which is impossible, (namely, possess himself of the ship at sea) but what he can do, that is, assert his title at the earliest period when he can make it available by taking possession. This the defendants in error did on the ship's return, and as soon as they were enabled to do so under the commission; and the question, therefore, comes to this, whether the register acts operate as a repeal of the statute of James? Now those acts were made with a view to very different objects.—The register acts relate *only to transactions between vendor and vendee; to cases of real ownership. The statute of James was passed to prevent tradesmen from being injured by false credit derived from apparent or reputed ownership: the case of apparent ownership is, by the very term, opposed to that of real ownership, and therefore cannot fall within the purview of the registry acts. The vessel, in the present case, is left in possession of the bankrupt with the consent of the true owner and proprietor, and I agree with Lord ELLENBOROUGH, that "these statutes do not affect titles passing by operation of law, as, to executors or administrators in case of death, or, to assignees generally in case of bankruptcy. In these cases a title may be transmitted without any of the forms required by the statute; and if a title may be transmitted without these forms in cases of bankruptcy generally, we see no reason why it may not be so done in a particular case, falling within the scope and operation of the statute of James." (a) That is the true ground on which these cases are distinguishable; we are not now considering the case as between vendor and vendee, but as between an assignee by operation of law, and an owner who has permitted the bankrupt to retain the vessel in his order and disposition.

As to the other point, I will only say that sufficient facts appear on this record to refer to the court the question of apparent ownership; and it appears to us that the conclusion to be drawn is, that the bankrupt was in possession with the consent of the true owner and proprietor. A reputed ownership in goods is established by the fact of the bankrupt's having the order and disposition of them with the consent of the true owner. Here, the bankrupt had such order and *disposition of the ship; and we are, therefore, of opinion, that the judgment of [122] the Court of King's Bench should be affirmed.

Judgment affirmed accordingly.

RICHARDSON, J., who, while at the bar was of counsel in the cause in the court below, was absent.

(a) Cited in *Hay v. Fairbairn*, 2 B. & A. 196.

REGULA GENERALIS.

(Hilary term, 60th Geo. III. and 1st Geo. IV.)

IT IS ORDERED by the court, that from and after the last day of this present Hilary term, no motion shall be made at the bar on the last day of any term touching the amendment of any fine or recovery, or any of the proceedings therein.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

C A S E S
A R G U E D A N D D E T E R M I N E D
I N T H E
C O U R T O F C O M M O N P L E A S ,
A N D
O T H E R C O U R T S ,
I I I
T r i n i t y T e r m ,
A N D I N T H E S U B S E Q U E N T V A C A T I O N ,
I N T H E F I R S T Y E A R O F T H E R E I G N O F G E O R G E I V .

G E O R G E E V A N S B R U C E a n d A N D R E W B A T W E L L v : T H O M A S B A I N B R I D G E .

The devisor, by will, left all his "real and personal estates" to his brother; by a codicil reciting, that since the making of the will his brother had died, and that devisor was possessed of a considerable fortune both real and personal, the devisor, after a devise to nephew J., left all his estates, lands, and tenements in H., F., and M., to his nephew, G. E., and other lands to nephews L. and C., respectively, none of them to come into possession till they were respectively of age; and if one or more of them should die before he or they came of age, the estate or estates of him or them so dying were then left to nephew J. and his issue lawfully begotten; and if J. should die without issue, to G. E.; and for default of such issue in G. E., to L. and his issue; and in default of such issue in L., to C. and his issue; and for default of such issue in C., to nephew S. and his issue; and for default of such issue in S., to niece K. and her issue, in such manner, and under such restriction and limitations as she should think proper to dispose of the same among her issue, it being the intent of the will to prevent waste by making the several children of G. E. tenants for life only. Power for nephews marrying to make reasonable settlements on their wives, and to dispose of their respective estates among the issue of such marriages, in manner as they should think proper to limit and appoint the same. The residue not disposed of was left to nephews and niece, except S., to be divided among them, share and share alike, at their respective coming of age, and if any should die before that time, the share of the party dying to go to the survivors and survivor: *Held*, that G. E., under this will and codicil, took an estate for life in the lands in H.

His honor, the vice chancellor, by an order in this cause, dated 7th March last, ordered a case to be made for the opinion of the judges of this court.

This ^{*124]} case first set out the will of Dr. Lewis Bruce, dated the 22d October, 1788, and duly executed and attested to pass real property. The will, after some preliminary matter, proceeded thus:

"And as touching and concerning all the real and personal estates as well in England as Ireland, which I am seized, possessed of, or otherwise entitled to, either in possession, reversion or remainder, after payment of said debts and legacies, I give, devise and bequeath the same in manner following, that is to say, I give, devise and bequeath to my brother, George Bruce, Esquire, of the city of Cork, all my real and personal estate in lands, tenements and hereditaments or otherwise, both in England and Ireland, to hold to him, his heirs and assigns, for

ever, subject and chargeable with the payment of the aforesaid debts, and subject and chargeable also with the payment of the several annuities and legacies hereafter given, devised and bequeathed by this my will"—: and, towards the conclusion, contained the following clause: "All the rest, residue and remainder of all my real and personal estates, both in England and Ireland, not heretofore disposed of, I give, devise and bequeath unto my said brother, George Bruce, Esquire, his heirs, executors, administrators and assigns for ever: and lastly, I do hereby appoint my said brother, George Bruce, Esquire, sole executor and residuary legatee to this my last will." By a codicil, dated 18th February, 1779, also duly executed and attested, (which recited the will above referred to and the appointment of George Bruce, then lately deceased, residuary legatee and sole executor,) Lewis Bruce nominated and appointed his nephews Jonathan and George Evans Bruce executors of his will, in the room of their father deceased. The codicil then, after deciding that his brother deceased, by will, appointed him, Lewis Bruce, residuary legatee, proceeded thus: "And whereas I am seised and possessed of a considerable fortune, both real and personal, which by *my will I did intend for my said brother deceased, [125] except such parts thereof as are therein otherwise disposed of: now, I do, by this codicil, will and dispose of the fortunes aforesaid in manner and form following:"—(after sundry legacies, and a devise of tithes and a term in lands in Ireland, to devisor's nephew, Jonathan Bruce)—"To my nephew, George Evans Bruce, I devise, give and bequeath all my estates, lands, and tenements in Hertfordshire. Finchley and Middlesex, in England, which I am seised or possessed of in right of my late wife." Then after some further devises of Irish property to devisor's nephews, Lewis Bruce and Charles Bruce, respectively, and legacies to other relations, and friends, the codicil proceeded thus: "And further it is my will, that my said nephew shall not be entitled to the actual seisin or possession of the several estates, bequests and annuities herein devised and bequeathed to them, until they shall respectively attain their several ages of 21 years; and, that the issues and profits thereof, over and above what shall be thought necessary for their respective maintenance and education, shall annually accumulate for their respective uses so soon as they shall attain the several ages aforesaid: and, if one or more of my said nephews shall happen to die before he or they shall attain his or their age or ages of 21 years as aforesaid, then, and in that case, I devise and bequeath the estate and estates of what nature or kind soever hereinbefore devised and bequeathed to him or them so dying, to my nephew, Jonathan, and his issue lawfully begotten: and, if the said Jonathan shall happen to die without issue, then, I devise and bequeath the estates, which he shall derive or be entitled to, under and by virtue of this my will, to his next brother, George Evans Bruce; and, for default of such issue in the said George, then the estates of the said Jonathan and George to go to and vest in my nephew Lewis and his issue aforesaid; and, in default of such issue in the said Lewis, then the estates of the said *Jonathan, George and [126] Lewis to go to and vest in my nephew Charles and his issue as aforesaid; and, for default of such issue in the said Charles, then the estates severally herein devised and bequeathed to his brothers aforesaid to go to and vest in nephew Saul and his issue in like manner; and for default of such issue in the said Saul, then the whole of the said estates devised and bequeathed to her brothers as aforesaid, to go and vest in my niece, Catherine Bruce and her issue, in such manner, and under such restrictions and limitations as she shall think proper to dispose of the same to and amongst her said issue; it being the intent and meaning of this my will to prevent waste by making the several children of my brother George, deceased, tenants for life only. And further, it is my will, that such of my said nephews as shall marry shall be authorized hereby to make reasonable settlements upon such wives as they and each of them shall take, and dispose of their respective

estates to and among the issue of such marriages in such manner as they shall think proper to limit and appoint the same." After a pecuniary legacy to Catherine Bruce, the codicil then proceeded as follows: "All the rest and residue of my worldly substance, of what nature and kind soever or wheresoever not already disposed of by this my codicil or by my last will, to which this is annexed, I devise, give and bequeath to my nephews and niece aforesaid, except my nephew Saul, who is to take no part thereof, being amply provided for otherwise, to be divided among them, share and share alike, at their respective ages of 21 years; and if one or more of them shall happen to die before he, she or they shall severally attain his, her or their respective age or ages of 21 years: then, I will and direct, that the share or shares of him or them so dying shall go to the survivors and survivor of them."

The question for the opinion of the court was, "What estate did George *127] Evans Bruce take under the will and codicil of Dr. Lewis Bruce or either of them in an estate situate at Totteridge, in the county of Hertf."

Lawes, Serjt., (with whom was *Lens, Serjt.*) for the plaintiff. By the first devise in the codicil to the plaintiff Bruce under the word estates, accompanied as it is there, he certainly would have taken a fee. *Holdfast dem. Cooper v. Marten*, 1 T. R. 411; *Fletcher v. Smiton*, 2 T. R. 656; *Roe dem. Child v. Wright*, 7 East, 259. If, however, it be contended that the words of the devise over to the other nephews are inconsistent with the grant of a fee to the plaintiff, those words are at least sufficient to give him an estate tail; for the word issue in a will is equivalent to heirs. *King v. Melling*, 1 Ventr. 214, 225; 2 Lev. 58; 3 Keb. 42, 50, 95; Poll. 101, a leading authority on these points, is, as reported in 2d Levinz, almost the same as the present case. The power given to the nephews to make settlements on their marriage does not narrow the construction, it being as necessary for a tenant in tail to have a power in order to enable him to make a settlement, as for a tenant for life. Besides, the estates of the nephews are, in case of their deaths, devised over to the niece; but a mere life estate could not be the subject of a devise over. The words, "it being the intent and meaning of this my will, to prevent waste, by making the several children of my brother tenants for life only," though in a certain degree expressive of intention, give no estate, and therefore can only operate as a condition; as such, they are void, and cannot control the intent before clearly expressed, to give the nephews an estate tail. To this effect is the rule as to intention laid down by *Feerne*, 6 Ed. 166, to 172. As a question of intent, therefore, it is clear, from the whole codicil, that the devisor meant to give his nephews an estate tail, and such intent cannot be *128] sacrificed to those latter words, which amount to no other than a condition inconsistent with the preceding grant.(a)

Bosanquet, Serjt., (with whom was *Vaughan, Serjt.*) contra. By the express words of the devisor, the plaintiff takes only an estate for life. The particular intent must, it is said, be sacrificed to the general, where both cannot stand together; but, in the endeavour to preserve the general intent, at the expense of the particular, both of them have too frequently been sacrificed; and the court will not carry the rule further than it has extended already. In *Piereson v. Vickers*, 5 East, 548, Lord ELLENBOROUGH says, "It is very doubtful in all these cases whether we do not act contrary to the real intention of the testator in giving more than a life estate to the first taker;" and Willes, C. J., says, (b) quoting Reynolds, J., "Shall not a man be allowed to speak his own mind in a will? Surely a man ought to be allowed to do so: and yet, if we consider how miserably some wills have been tortured, we may fairly say that this is a privilege not always allowed to testators." It is true, that where the general

(a) See *Feerne's Rem.* 256, 258. See also *Seale v. Barter* 2 B. & P. 485, and *Dos dem Cole v. Goldsmith*, 7 Taunt. 209.

(b) In *Ginger v. White*, Wilts, 351.

intent cannot be effected without giving the devisee an estate tail, that construction must be put on a devise; *Langley v. Baldwin*; (a) but that is not necessary here; and independent of the express words, it is clear the devisor meant the nephews only to have an estate for life. If they marry and have issue, that issue is not to inherit in the ordinary way, but to take distributively under the appointment of their parents; and yet it is contended, that one nephew may take an estate, suffer a recovery, and defeat this disposition to the future grand nephews. Issue may be applied as a word of purchase *or limitation, [*129 accordingly as the intent of the devisor may require. (b) The provision made for the grand nephews shows, that, with respect to them, it is used as a word of purchase, and the sense there affixed to it must govern the sense in which it is to be applied in the rest of the will. *Robinson v. Robinson*, 1 Burr. 38; *Hockley v. Mawbey*, 1 Ves. Jun. 148; and *Doe dem. Wright v. Jesson*, 5 M. & S. 95; especially the latter, seem to rule the present case. In *Doe v. Jesson*, the power in the parent to appoint among his children, was one of the reasons for holding that he had only an estate for life, notwithstanding the devise was to such heirs of his body as the parent should appoint. Upon the authority of that case, too, the same construction must be put by the court upon the word issue in the first part of this codicil, as has been put by the devisor himself in the latter part, and the children must take distributively as purchasers. A life estate, here, will also be consistent with the testator's general intent: for, though, in some cases, if the first taker have only an estate for life, the property may, in consequence of his having no larger estate, go over to a stranger to the exclusion of some of the blood of the first taker; yet, here, that inconvenience is avoided by the parent having a power to appoint a fee among his children. It is not necessary, here, to argue what could be the effect of the parent's omitting to appoint, or to enter into the distinction between powers and trusts; though it is probable that, if the parent omitted to appoint, a court of equity would consider him as a trustee, and appoint in his stead: *Brown v. Higgs*, 4 Ves. Jun. 708: 5 Ves. Jun. 495.

Lawes in reply. The codicil no where enables the parent to appoint a fee among his children; he has only *a bare power of appointment, without any mention of the quantity of estate to be appointed. The cases cited do not [*130 affect the terms of the present will, and *Doe v. Jesson* is clearly distinguishable; for, there, the devisee had only a life estate given him in the first instance.

Cur. adv. vult.

The following certificate was afterwards sent:

'This case has been argued before us by counsel, we have considered it, and are of opinion, that the plaintiff, George Evans Bruce, took an estate for his life only in the estate in question in this cause.'

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

(a) In *Attorney General v. Sutton*, 1 P. Wms. 59.
(b) By Wilmot C. J., in *Roe v. Grew*, 2 Wils. 333.

IN THE EXCHEQUER CHAMBER.

HOME v. Lord F. C. BENTINCK.

The commander-in-chief of the army, having directed an assemblage of commissioned military officers to hold an inquiry into the conduct of H., a commissioned officer in the army; and H. having sued the president of the inquiry for a libel, stated to be contained in the report thereupon made: Held, that this report was a privileged communication; that it was properly rejected as evidence at the trial; and that an office copy of the same was also properly rejected.

THE plaintiff declared against the defendant for a libel. The declaration, which consisted of several counts, setting forth various parts of the libel, with the publication of which the defendant was charged, stated in the first count, *131] by way of inducement, that before and at the time of the commission of the offence charged, the plaintiff was a lieutenant-colonel in his majesty's army, that he had been engaged in a certain mining adventure, carried on under the firm of Salisbury and Co. and that in the Court of Chancery, an injunction had been obtained, restraining the plaintiff from accepting or endorsing bills in the name of the persons trading as aforesaid; that he had never been guilty or suspected to have been guilty of unfair, dishonest, or improper conduct in the partnership concern; or of any wilful or fraudulent secreting or withdrawing himself from the service of any process of the Court of Chancery, or of any other improper conduct, but, on the contrary, had always hitherto conducted himself in a fair and honest manner in his transactions with his partners, and in all other transactions, and in every respect in a manner worthy of his character and situation as a gentleman and an officer in his majesty's service.

The last count of the declaration (in which the whole of the libel charged was set out) stated, that whereas the defendant was appointed with six other persons by his royal highness, the Duke of York, commander-in-chief of his majesty's forces by land, to inquire into the conduct of the plaintiff in the mining adventure, in the first count of the declaration mentioned: and whereas the defendant was appointed to preside at the deliberations of the said persons, and to report to the said duke the opinion of the said persons touching the conduct of the plaintiff in the said mining adventure; and although it was the duty of the defendant to report truly the opinions of the said persons, yet the defendant well knowing, &c. but wrongfully intending to injure the plaintiff, and to deprive him *132] of the countenance and good opinion of the *Duke of York, falsely and injuriously suggested and represented to the Duke of York, that the said persons so appointed as aforesaid, had unanimously agreed in certain opinions, there following, of and concerning the plaintiff as such officer, and his conduct in the mining adventure, viz. "1st. That Lieutenant-colonel Home became a partner in the firm of Salisbury and Co. 2d. That Lieutenant-colonel Home, as appears in his letter marked No. 3, expressed himself perfectly satisfied with and gave his consent to any arrangement that might be made by the managing partner of that concern. 3d. That notwithstanding an agreement entered into by the co-partners, viz. that no one but the managing partner should draw or endorse bills, Lieutenant-colonel Home's brother, David Home, did draw bills to a larger amount than the sum vested by Lieutenant-colonel Home in the said concern, which bills were accepted by Lieutenant-colonel Home, on the firm of Salisbury and Co. It is necessary here to observe, that Lieutenant-colonel Home declares his ignorance of the articles of agreement, which he affirms he never saw; and, moreover, that, in those articles restricting any but the managing partner from drawing or endorsing bills, the word accept does not appear. The other partners, however, maintain that it was understood by them, that they were equally restricted from accepting bills. The court think themselves further called upon to observe, that Lord ELLENBOROUGH in his charge to the jury, in an action in which Lieutenant-colonel Home was defendant, considers the bills drawn by David Home, in the same light as if drawn by his brother, Lieutenant-colonel Home. 4th. That Lieutenant-colonel Home took measures to avoid receiving personally the Lord Chancellor's injunction, restricting him *133] from drawing, accepting and endorsing bills on the firm of *Salisbury and Co.: and, in the steps taken by him to avoid the Lord Chancellor's injunction, as well as what subsequently took place between himself and Quarter-master Weston, the conduct of Lieutenant-colonel Home does not appear to have been actuated by those high and delicate feelings of honour, which in all transactions of life ought to influence an officer of his high rank and reputation."

Whereas, in truth and in fact the said persons so appointed as aforesaid, at the time of the defendant's making the said representation to the Duke of York, did not, nor did they at any other time, unanimously agree in the said opinion; by reason whereof the plaintiff was greatly injured, &c., and also by reason whereof his Royal Highness, George, Prince of Wales, Regent of the united kingdom, &c., acting in the name and on the behalf of his majesty, did deprive the plaintiff of his rank of lieutenant-colonel, in the service of his majesty, and did also deprive him of his commission of captain in his majesty's third regiment of foot guards, &c. &c. (a) Plea not guilty.

At the trial before ABBOTT, C. J., (Guildhall sittings before Michaelmas term, 1819,) Sir Henry Torrens proved that the plaintiff was, at the time of the transactions in question, lieutenant-colonel in the army, and captain in the third regiment of foot guards; the defendant a major-general, and at the time of such transaction colonel in the army: that the witness was military secretary to his Royal Highness, the Duke of York, commander-in-chief of his majesty's forces; that the witness, as such military secretary, was in possession of the minutes of a court of inquiry held by the directions of the commander-in-chief, of which the defendant was the president; that the court of inquiry consisted of several other military officers as well as the defendant, and, that the inquiry [*134] was directed by the commander-in-chief to be made by such court upon the conduct of the plaintiff; that the minutes, so in possession of the witness, were the minutes of the proceedings, evidence, and judgment of the said court of inquiry, and were delivered by the defendant, as president of the said court, personally to the commander-in-chief, as the report of the said court upon that inquiry; and, that the commander-in-chief deposited these minutes in the office of the commander-in-chief, and the same, by being so deposited, became and were under the care and in the custody of the said Sir Henry Torrens, as such military secretary. The counsel for the defendant then insisted, that the said minutes could not be admitted and allowed to be read in evidence; and the counsel for the plaintiff insisted that such minutes ought to be admitted and allowed to be read in evidence for the plaintiff. ABBOTT, C. J., thereupon delivered his opinion, that the said minutes ought not to be read in evidence. The counsel for the plaintiff then tendered a copy of the said minutes in evidence for the plaintiff, delivered from the office of the commander-in-chief; but ABBOTT, C. J., delivered his opinion, that such copy ought not to be read in evidence; and under his direction the jury found a verdict for the defendant. The counsel for the plaintiff, thereupon, tendered to the Chief Justice a bill of exceptions, containing the several matters so offered in evidence, whereunto his lordship set his seal, according to the statute. Judgment having passed for the defendant below, the plaintiff below assigned errors; and, the defendant below having joined in error, the case now came on to be argued.

*Evans, Joshua, for the plaintiff, in error. The matter set forth in the declaration is clearly libellous, *Bell v. Stone*, 1 Bos. & Pul. 331; [*135] *Thorley v. Lord Kerry*, 4 Taunt. 355; and, at all events, when followed by the consequences there stated, is clearly actionable, *Moore v. Meagher*, 1 Taunt. 39. If, however, the court should reject the only evidence which can prove the existence of this libel, such rejection will, in fact, be a decision that the libel in question is one for which the party libelled can bring no action; one, which the party publishing is privileged to publish. Now the only cases in which a person may speak or write to the discredit of another, and on which the person so injured cannot bring an action, are the cases of judges and jurors, *Sutton v. Johnstone*, 1 T. R. 503; *Jekyll v. Sir J. Moore*, 2 N. R. 341; witnesses and parties speaking in courts of justice: but any further argument upon this class of cases is unnecessary, if, as will be clearly shown, the court of inquiry was

(a) Loss of the society of friends, &c. was also alleged.

not a legal court. It has been holden, too, that counsel may justify the use of defamatory expressions, but with this restriction, that they must be suggested, and pertinent, *Brooke v. Montague*, Cro. Jac. 90. So a master will not be liable in damages for speaking ill of a servant whose character he is requested to give, provided such master can clearly show that he has spoken conscientiously and without malice. But, in these cases, the plaintiff is always allowed to show malice, if he can, *Rogers v. Clifton*, 3 Bos. & Pull. 587; *Rex v. Waring*, 5 Esp. 13. The defendant was neither master nor counsel to the plaintiff; *136] and the cases cited prove how careful the law is "to prevent unnecessary injury being done to the characters of individuals. There are also certain cases of confidential communication, in which it has been holden, that a person *bonâ fide* advising his friend not to trust a third person, is not liable to an action, *Herver v. Dowson*, Bull. N. P. 8; *Vanspike v. Cleyson*, Cro. Eliz. 541; *McDougall v. Claridge*, 1 Campb. 267; *Cleaver v. Sarraude*; *Dunman v. Bigg*, Id. 269; *Barbaud v. Hookham*, 5 Esp. 109.

But, in all cases of confidential communication, it is essentially necessary that the person making an inquiry, should be directly interested in the object of the inquiry, and that the person communicating should communicate only the result of his own knowledge, and to the person interested; neither can information be given affecting the character of the party, in any point save that about which the person inquiring is interested; and, when the question has been as to the solvency of a trader, the skill or honesty of an attorney or steward, the person communicating has never been permitted to defame the character of the party, by stating matter totally irrelevant, as, that he was a bigamist. If a man giving advice, calls another a thief, it is not necessary to leave it to the jury, whether such language is a confidential communication.(a) The libel, of which the plaintiff complains, has no one quality of a confidential communication; it is written by persons no way interested; it is written to the commander-in-chief, but does not contain one word as to the plaintiff's military conduct; it makes no complaint of the plaintiff's conduct with respect to the defendant. It is not the *137] result *of the defendant's own knowledge, but of a public examination of persons in the presence of numerous spectators. The libel is not a statement of facts, it is a direct censure of the plaintiff's conduct and character. "If a felony be committed, it is a good cause to arrest one for felony, but not to speak words to defame one." *Scarlett v. Stile*, Brownl. 2. If the defendant, in *Barbaud v. Hookham*, instead of acting on his own knowledge, had inquired from different persons what they knew to the disadvantage of the plaintiff, and, in consequence of defamatory stories told by such persons, had made the report to the committee, there can be no doubt that such conduct would have furnished sufficient evidence of malice, and would have deprived him of all protection which he derived from his confidential communication. In *Browne v. Croome*, 2 Starkie, N. P. C. 297, Lord ELLENBOROUGH held, that an advertisement in a public paper, strongly reflecting upon the character of an individual who had been declared bankrupt, was libellous; though published with the avowed intention of convening a meeting of creditors for the purpose of consulting upon the means proper to be adopted for their own security, if the legal object might have been attained by means less injurious. If a person, instead of privately inquiring whether his servant or tradesman is trustworthy, an attorney intelligent, or the like, were, by himself or deputy, to summon the servant's, trader's, or attorney's friends and enemies, and examine them, not only on those matters, but on the domestic conduct of the parties, it cannot be doubted that such a mode of inquiry would be illegal and actionable: in such a course, there is none of the confidence, none of the secrecy, always required, *138] when the characters of individuals are in question, but "a court of justice is erected, at once dangerous and illegal. The libel in question, then, can-

(a) 1 Brod. & Bing. 8, per Richardson, J., in *Godson v. Home*.

not be considered as a confidential communication made by individuals: the facts that the libel of which the plaintiff complains was the production, not of one person deputed to make inquiries, but of several, and that they made those inquiries, not secretly and confidentially, but assuming to be a court of justice, are sufficient to prove it not a confidential communication. Unless the assemblage of officers can be supported as a legal court, or as a legal commission, the defendant can only be considered as an individual, and must plead the truth of the libel, if he can, in justification; the mockery of a court of justice, instead of palliating, must aggravate his offence, if what he has published be false and malicious. Nor can he be justified in consequence of any authority which he may have received from the commander-in-chief. High as that commander is in rank and situation in this kingdom, he is but a subject, and cannot claim any privileges as commander-in-chief, to which the meanest subject in the land, if appointed to the office, would not be entitled. If the commander-in-chief has the power, every person in the employment of government has the power of directing what inquiry he may choose into the conduct of any persons holding any place or office at the will of the sovereign; and, if the persons directed to inquire are protected in whatever calumnies they may falsely and maliciously state, no slavery that ever existed would be comparable to it; for there is scarcely any person of the rank of a gentleman in this country, who, in some way or other, may not hold a situation at the will of the sovereign. The Lord Chancellor, all privy councillors, the attorney and solicitor general, all justices of the peace, all officers in the customs and excise, all officers in the army and navy, all barristers, all attorneys would be subject to such inquiry: [^{*139} but it never can be argued, that any department of his majesty's government may direct inquiries to be made into the public or private conduct of an individual, and may authorize the writing of false and malicious libels against him. It is unnecessary to cite authorities or adduce arguments to prove that no subject of this realm can appoint a commission or erect a court, without authority either from the sovereign or the legislature. If the defendant and the other officers had any such authority to sit as a court of justice, it was incumbent upon him to have shown it: he did not and could not do so. To give the defendant every advantage in the argument, let us, however, go the length of presuming that the defendant and other officers were commanded even by his majesty himself (although such was not the case) to inquire and give an opinion on the plaintiff's character and conduct; it will now be proved that the sovereign himself could not legally erect such a tribunal. If their authority was derived from that high source, they must have constituted either a court or a commission: there is no other expression that can be used for the purpose of describing them; the following description of courts of inquiry is given by a writer on military tribunals: (a) "A Court of Inquiry is of a very delicate nature; a number of officers are assembled to inquire into an officer's supposed misbehaviour, and I have known them ordered to give their opinions in writing to the person who ordered them to assemble, that he may judge from their determination, if there is sufficient matter to bring him to a general court-martial. There is no article of war for this kind of proceeding, and though it has frequently been complained of, because the members are not sworn, and that its opinions may influence a general court-martial, yet reason has hitherto been unsuccessful in its endeavours to abolish this inequitable custom of the army." [^{*140} In all military writers it is stated, that the members of a court of inquiry are not sworn, nor do the witnesses give their evidence on oath, neither can any person be legally obliged to furnish information or give his testimony. The method of proceeding, and the constitution of courts of inquiry, are in direct contradiction to the course of proceeding by the common law of the land. The prerogative of the sovereign in erecting courts of justice, is thus laid down in

(a) Syme's Mil. Dict. sub voc. Court.

Comyn's Digest, tit. *Prerogative*, D. 28: "The king, by his prerogative, may make what courts for the administration of the common law, and in what places he pleases, but the king cannot erect a court of chancery or conscience, nor grant to a court that it may proceed by civil law: nor can he by charter, or commission, alter the common law. So, the erection of a new court with a new jurisdiction cannot be without act of parliament." These authorities are decisive, that the sovereign himself could not erect such a court of inquiry, which, in point of fact, has no resemblance to a court of justice except the name. The judges are not on oath, and no judgment can be given. Suppose it then, to be a commission to inquire? In 12 Co. p. 31, it is said, "Note, commissions in English under the great seal were directed to divers commissioners, within the counties of Bedford, Bucks, Huntingdon, &c. to inquire of divers articles annexed to it, to inquire of depopulation of houses, &c.; but the commissioners should not have any power to hear and determine the said offences, but only to inquire of them: and by colour of the said commissions the said commissioners took many presentments in English, and did return them into chancery, and, *141] "after, it was resolved (by nine judges,) that the said commissions were against law, (for these reasons, among others, viz.) that it was only to inquire, which is against law, for by this a man may be unjustly accused, and he shall not have any remedy. Also, the party may be defamed, and shall not have any traverse to it. Such a commission may be only to inquire of treason, felony committed, &c. and no such commission ever was seen to inquire only, i. e. of crimes." This case shows conclusively that by the common law a commission to inquire, without a power to determine, was always illegal: but the illegality of such commissions does not rest merely on that decision; the same doctrine is laid down in 2 Inst. 163, 2 Hale 21, s. 5. In Rot. Parl. 15 Ed. 3, 2 Roll's Abr. 164, Pl. 84, it is prayed, that divers commissions of inquiry by the chancellor, treasurer, and other great officers be repealed, for that it is not lawful to grant them without assent of parliament. By 42 Ed. 3, c. 3, confirmed by 16 Car. 1, c. 10, it is enacted, "that no man be put to answer without presentment before justices, or matter of record, or by due process, and writ original, according to the old law of the land, and if any thing from henceforth be done to the contrary it shall be void in the law and holden for error." By 1 W. & M. c. 2, s. 2, it is enacted, "that the commission for erecting the late court of commission for ecclesiastical causes, and all other commissions and courts of like nature, were illegal and pernicious." As a standing army is merely the creature of the mutiny act, there can be no immemorial custom belonging to the army; but, supposing that these courts of inquiry had custom to support them, yet such custom would be illegal, as contrary to the authorities cited. In *Tredymmock v. Perryman*, Cro. Car. 259, a custom to try causes by six jurors was held * illegal, though such custom had existed beyond the time of legal memory, and many judgments had been given on verdicts so found; and in *Leach v. Money*, 1 W. Bl. 555, it was held, that even antiquity itself could not sanctify a usage which was fundamentally bad. Therefore, unless the mutiny act makes a distinction as to the military, let the defendant and the other officers call their meeting a court or commission, or whatever the defendant pleases, it was illegal, even although it had been called together by the sovereign himself: but, if there be any class of his majesty's subjects which is by law particularly protected from such an inquisition it would appear to be the army. The preamble of the mutiny-act, 1 Geo. 4, c. 19, runs thus: "And whereas no man can be forejudged of life or limb, or subjected, in time of peace, to any kind of punishment within this realm by martial law, or in any other manner, than by the judgment of his peers, and according to the known and established laws of this realm; yet nevertheless, it being requisite for the retaining of all the before mentioned forces in their duty, that an exact discipline be observed, and that soldiers who shall mutiny, or stir up sedition, or shall de

sert his majesty's service, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow, be it therefore enacted," &c.; the act then proceeds to designate the punishment for the several offences, authorizes his majesty to grant commissions for holding courts-martial, s. 14; enacts how courts-martial are to be formed, s. 20; and directs that officers on courts-martial shall be sworn, s. 28, 29. By s. 35, it is enacted, "That it shall and may be lawful to and for his majesty to form, make, and establish, articles of war for the better government *of his majesty's forces, which articles shall be judicially taken notice of by all judges and in all courts whatsoever." By s. 37, it is further enacted, "That for bringing offenders against such articles of war to justice, it shall be lawful for his majesty to erect and constitute courts-martial. By art. 30, s. 16, "Whatsoever commissioned officer shall be convicted before a general court-martial, of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from our service; provided, however, that in every charge preferred against an officer, for such scandalous and unbecoming behaviour, the fact or facts whereon the same is grounded shall be clearly specified." By art. 2, s. 24, "All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not specified in the said rules and articles, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and to be punished at their discretion." The mutiny-act, then, is an authority for every position before stated. The preamble acknowledges that no person can be legally tried except by his peers, and according to the common law of the land; it allows that military persons would be in the same situation but for its enactments; but it does not enact, that they may be tried by persons not sworn, on the evidences of persons not sworn, or that the accused shall not have the power of summoning witnesses; it enacts the reverse of all this. It certainly gives the sovereign almost boundless power as to framing articles for the government of the army: the sovereign may make any thing an offence, but he cannot appoint such a tribunal as a court of inquiry to try the offenders: the statute expressly enacts, that the trial shall be by courts-martial; *on what ground then can it be contended that an officer can be tried by any other court than an ordinary court of justice, or the particular court appointed by the mutiny-act? Mr. Justice POWELL, in the seven bishops' case, says, 4 Sta. Tri. 341, "I think there is no danger to the government at all in requiring good proof against offenders." In *Grant v. Gould*, 2 H. Bl. 95, it is said, that it is not to be disputed, that martial law can only be exercised in this country as far as it is authorized by the mutiny-act, and the articles of war. In *Johnstone v. Sutton*, 1 T. R. 549, the two chief justices state, if a man be charged with an offence against the articles of war, or, when the articles are silent, against the usage of the navy, his guilt or innocence can only be tried by a court-martial. If it were true that the sovereign had a right to dismiss an officer without assigning any reason, or having any reason, yet, the authorities cited, show that he would not have a right to appoint such a court of inquiry. It is absurd to state that the infliction of this court of inquiry on the plaintiff is an act not of punishment but of mercy, when the severest punishment allowed by the articles of war and the mutiny-act is cashiering, except in two or three instances when loss of life is the punishment. In Comyn's Digest it is said, "The king's prerogative cannot be exercised but for the benefit of the subject."^(a) But what can be more injurious to individuals or the nation, than without a sufficient cause to dismiss an officer from the army or navy, and what cause, sufficient to justify such dismissal, could not be tried by a court-martial? In *Oliver v. Lord W. Bentinck*, 3 Taunt. 459, Sir James Mansfield says, "The libel is in fact a recital of the effect of the authority under which the defendant acts,

(a) Com. Dig. *Prerog.* D. 23.

*145] and it would be a "monstrous thing if the court of directors were to dismiss an officer without assigning a reason." It may be urged that this is the first action of the kind, but this is the first case in which a court of inquiry has afforded an opportunity. In all the military writers a court of inquiry is likened to a grand jury, and it is stated, that it is, at the utmost, its duty to find whether there are grounds for a court-martial or not; in this case, the defendant and other officers passed a judgment. The libel in question could not be justified as the act of ordinary individuals, unless by averring the truth of the slander, and proving it, and in such a case the plaintiff would have been allowed to show the falsehood and malice of the charges. Having proved, then, that this court of inquiry could not be appointed by any subject, however high his rank; and having shown that the sovereign himself could not constitute such a court or commission, and, therefore, that no person acting under it could derive any protection from it; (indeed it might have been asserted that any person advising his majesty to constitute such a tribunal would be guilty of a highly aggravated misdemeanor, and that the persons acting under it, although not guilty to the same extent, would be highly culpable for leading themselves to such an illegal act;) the plaintiff has proved that the Lord C. J. of the King's Bench was not justified in refusing to allow the reading of the minutes of the court of inquiry: if the appointment of the court was illegal, the report is like any other libel written by an individual, and the party in whose possession it is, is bound to produce it. But, supposing the argument to be erroneous, and that the court called a court of inquiry was a legal court, or a legal commission, or its resolutions a legal confidential communication, still it would be impossible to support the learned judge's refusal of the evidence.—If the resolutions can

*146] be "considered a private confidential communication, the defendant cannot show a single instance in which the paper containing such confidential communication has been refused to be received in evidence; if a communication be false and malicious, the covering it with the semblance of a confidential communication would not protect the writer from an action. If the court of inquiry can be considered as a legal court, or a legal commission, there can be no doubt but the original proceedings, or a copy, must be admitted in evidence; the only exception is, that of an indictment for felony when the party accused is acquitted: in the case of misdemeanors the party is entitled to a copy of right; and even in case of felony, although it is ordered that no copy be given without a judge's or the attorney general's order, yet if a copy or the original be produced, it must be received in evidence: (a) in the present case, the plaintiff was prepared with the original and a copy, but the chief justice refused to allow either to be given in evidence. In the case of courts-martial, the mutiny act enacts, that a copy of the proceedings shall be furnished. As it was at the trial, it will probably, now, be contended, that the libel, as being a confidential communication to one of his majesty's superior officers respecting another officer of his majesty, was privileged. It can scarcely be seriously contended, that a person may write a false and malicious libel of an officer in his majesty's service, and that such officer can have no redress. It can make no difference that he was required to make inquiries by a superior officer; if that officer were a party to the falsehood and malice, it would make it a conspiracy, if he was not, the writer would not be less guilty. In the case of the seven bishops, 4 Sta. Tri. 342, the clerk of the privy council was compelled to state what passed in the council chamber, nay, what

*147] *was said by the king himself, although the counsel for the crown resisted it most strenuously. The same evidence was also allowed to be given in *Lord Strafford's case*, 1 Sta. Tri. 727. Notwithstanding the oath administered to the collector of the property-tax, by the commissioners, that he will not disclose any thing he hears in that capacity, except by their com-

(a) *Legatt v. Tollervoy*, 14 East, 302.

mand, or by virtue of an act of parliament, he is bound, when subpoenaed as a witness, to give evidence of all facts within his knowledge touching the matter in question, *Lee v. Birrell*, 3 Campb. 337. In *Robinson v. May*, 2 Smith, 3, Lord ELLENBOROUGH and the Court of King's Bench held, that though it may be the duty of all persons to give information to his majesty's proper officers concerning abuses, yet, if one write of another in a letter to such officer, that he is doing something to the prejudice of his majesty's service, which is not true, this is sufficient evidence of malicious intention; and when no defence is set up by the defendant, the jury may well find him guilty, though there be no other publication, and no further proof of malice. What is a malicious publication, it is for the jury to determine. It seems impossible to distinguish the case now before the court from that of *Robinson v. May*; that case conclusively proves, that if a communication to government be false and malicious, it may be the subject of an indictment or of an action. Whatever means the party may use to get possession of such a document, or of an authentic copy, can make no difference in the case; it must be received in evidence. *Attorney-General v. Le Marchant*, 2 T. R. 201; *Rex v. Archer*, 2 T. R. 203. At the trial of the present cause, the attorney-general said, the objection made by him was *not new, and he referred to the case of *Cook v. Maxwell*, which he read from a short-hand note, stating that Governor Maxwell, the defendant, had given particular orders to one of his officers, which orders were called for by the plaintiff; but it was determined by BAYLEY, J., that they were a privileged communication to that officer, and that as a privileged communication, they ought not and should not be produced. But in the printed report of *Cooke v. Maxwell*, 2 Starkie, N. P. C. 183, BAYLEY, J., says, "the law will not work injustice; if the document cannot on principles of public policy be read in evidence, the effect will be the same as if it was not in existence, and you may prove, not the contents of the instrument, but that what was done was done by the order of the defendant." In another short-hand writer's notes of the same trial, Dowling's MSS., in addition to what the printed report contains, BAYLEY, J., is made to say, "Indeed, in this case, I do not know that, that which was issued by Governor Maxwell, was at all within the scope of any authority he had derived from and in virtue of his situation as governor." It thus appears how inaccurate the report cited by the attorney-general was; BAYLEY, J., does not decide that the evidence was inadmissible, but would have compelled the production of it, if no other evidence could have been had; and it is a case expressly in point, to show, that if any imperious rule of law prevented the production of the original, the plaintiff was entitled to give secondary evidence. It has been argued, that it was necessary for the interest of the army and of the public, that these inquiries should be made, and that it would be against the public interest to allow the production of the report: necessity is always a suspicious argument, and never wanting to support the worst of measures. *It is clear, that by law these courts of inquiry are not allowed; [*149] but suppose, for one moment that necessity could make such courts lawful, what is the necessity? By a court-martial, every offence, however minute, may be inquired into. It can never be argued, that martial law is too mild, and gives too little power to the sovereign. Such at least is not Blackstone's opinion on this subject, 1 Bl. Com. 416. For what purpose, then, can this power be so eagerly sought? If any other man commit an offence, the courts of his majesty are open for the investigation, and if he be guilty, will punish him; if an officer in the army commit an offence, in addition, a court-martial is provided. These courts of inquiry can only be so anxiously defended for the purpose of destroying the innocent and protecting the guilty. To quote the words of a military writer, Williams' Mil. Law, 148, "The paradox of a guilty man without fault is not more inadmissible in law than irreconcileable with experience; military law recognising even all disorders and neglects which officers

and soldiers may be guilty of, though not specified in the articles of war." It has now been shown, that the report of the defendant and the officers cannot be considered as a confidential communication by individuals; that, if it could be so considered yet the plaintiff ought to have been allowed to give evidence to show that it was false and malicious; that the only difference between officers of the army and other persons, is caused by the mutiny-act; that, by that act, courts-martial are appointed for the trial of military men; that the sovereign himself cannot create such a court as a court of inquiry, it being illegal both by the common and the statute law; that, if it be illegally constituted, its *150] proceedings "ought to have been admitted when produced; that, if it could for a moment be considered as a court or commission, the plaintiff was entitled to the minutes and evidence; and that the sovereign is vested with sufficient power for the government of the army. But, if that were not the case, and if more power be necessary, that is the province of the legislature, not of the court. Therefore, until the legislature shall have authorized the exclusion of such evidence as the plaintiff has tendered in this case, he trusts that the court will consider it ought to be admitted.

Littledale, for the defendant. Upon the trial of this cause, certain documents were offered in evidence, and the admissibility of those documents is the only question for the consideration of the court. A court of inquiry was directed by the commander-in-chief; the defendant was the president of that court of inquiry; and these documents formed the report of that court of inquiry, which was made to the commander-in-chief, in consequence of the directions which he had given for the holding this court. Under such circumstances, the minutes forming the report are of that nature, that they ought not to be received as evidence: they are confidential communications; and ought not for the safety and security of the state to be read without the direction of his majesty. By the common law, the king has, by his prerogative, the command of the army: his powers are restrained by the mutiny-act, which recites, "that a standing army in time of peace, unless it be with the consent of parliament, is against law:" but still, when there is an army in time of war or peace, the king is the supreme commander of it; and though we have not absolute control over the lives and limbs of the persons who compose it; though he may be restrained as to the mode in *151] which *he shall exercise his government over the army, yet, where the mutiny-act is silent, and proceedings appear necessary for the due discipline of the army, the king has a right to direct what he thinks proper. This is no more than the exercise of other prerogatives in the affairs of state, in all matters relating to affairs abroad and at home. It is not necessary to point out all the inconveniences which might arise, if all the reports made to government were to be made the subject of public discussion, and to be the subject of observation in all public prints in this country. It is the policy of the law, that all these communications should be kept secret.

The king, then, though restrained in a certain degree from exercising that full control, which a despotic commander would have in a foreign country by the mutiny act, has the direction of issuing such orders as he pleases, for the better discipline and regulation of the army, provided they be not contrary to the mutiny act or the common law. All licentiousness in the conduct of officers he may inquire into, for the commissions of all officers are held at the pleasure of *152] the crown; (a) and though, in many cases, for the *punishment of offences against the discipline of the army, the mutiny-act has provided

(a) Arthur Herbert, Earl of Torrington, admiral and commander-in-chief in the reign of King William 3, was tried at a court-martial, held on board the Kent at Sheerness, in December, 1690, in pursuance of a commission from the lords of the admiralty, upon the following heavy charge, founded upon the report of commissioners previously appointed to inquire into his conduct; viz. his having, "in the engagement with the French off Beachey-Head, (30th June, 1690,) through treachery, or cowardice, misbehaved in his office, drawn dishonour on the English nation, and sacrificed our

courts-martial to be held, the king, by his prerogative, has a right of appointing what is called a court of inquiry. These courts of inquiry have been held as long ago as any memory goes back; though the earliest instance recorded, it is apprehended, is that which was directed upon the expedition to the coast of France, in 1756; where the crown in 1757, directed an inquiry into the reason of the failure of that expedition.(a) It was the constant practice in the course of the last war to hold these courts of inquiry. After the landing in Portugal, there was an inquiry, and no court-martial, and so in other instances. How is the prerogative of the crown to be known but by the exercise of that prerogative? These are not cases which can be cited from books; but the practice has been invariable. The object of courts of inquiry is not to punish the parties, but to direct certain officers who are named in the commission to make inquiry as to particular circumstances; and, then, upon the result of their inquiry being laid before his majesty, he directs, by the commander-in-chief, whether he thinks it right to have a court-martial or not. The court of inquiry resembles a grand jury. A man is not put to answer criminally unless there be a bill found, or an information filed in the king's bench, or in particular cases as to "high roads, where a presentment is made by a magistrate; and, therefore, the principle is, that no man shall be put on his trial without previous inquiry being issued, to put his conduct in a due course of investigation. If, then, it be a prerogative of the crown to issue a commission to hold a court of inquiry, the communications made to the crown ought to be protected and kept secret by analogy to the proceedings of a grand jury. Persons composing a grand jury are sworn to secrecy: it does not appear that persons composing a court of inquiry are so sworn; but, still, the two tribunals so far resemble each other, as to prevent the proceedings of either from becoming the subject of discussion. But the broader and better ground is, that it is in the nature of all communications whatever, which are required by the crown from its officers, as to any matters which concern the state in any way whatever. Suppose the crown were to direct the secretary of state for foreign affairs to send to inquire into the state of a garrison abroad, and the commanding officer were to make a report in consequence, which reflected on the conduct of some of the officers, would there be any pretence for saying that if an officer felt aggrieved by it, and no further steps were taken upon it, he could compel the production of that report? That report might not only relate to this officer, but to a great many other things, which it would be most injurious to the public service to disclose: it might relate to improper conduct in the garrison on the part of several persons: it might relate to the communications which they were having with the enemy: it might contain a communication from the enemy, on which it would be highly advantageous to act: and yet according to the doctrine contended for, the whole report must be received, if one officer was aggrieved. So, if the lords of the admiralty were to direct inquiry as to the state of a ship; if the officers were aggrieved, the whole report would not be allowed to be read. If the conduct of the plaintiff had been the subject of inquiry not by the crown, but by the House of Lords, or the House of Commons; if a report had been made by the good allies the Dutch;" and, notwithstanding the court unanimously acquitted his lordship of any imputation whatever from his conduct on that occasion, his commission was suspended, and he never was afterwards employed.

In July, 1702, Sir John Munden, rear-admiral of the Red, was tried by a court-martial, in pursuance of a commission from Prince George of Denmark, Lord high-admiral, upon several charges exhibited against him of miscarriage and neglect, in intercepting a squadron of French ships, which were to sail from the Groyne to the Spanish West Indies. The court, having examined the several articles of charge, gave their opinion, that the rear-admiral had fully cleared himself from the whole matter contained in them, and, as far as appeared to the court, had complied with his instruction, and behaved himself with great zeal and diligence. Notwithstanding this acquittal, Queen Anne ordered him to be dismissed from his post and command in the royal navy. M'Arthur on Courts Martial, vol. I, pp. 109, 111.

(a) Sir John Morden's case, M'Arthur on Courts Martial, vol. I, p. 112, 4th ed.

committee, and the clerk were subpoenaed to bring it in evidence, any person, who insisted on its production, would be committed by the house for a contempt. So, in those matters which relate to the prerogatives of the crown, the officers are not compellable to produce the reports made in consequence of the direction of the crown, and cannot be allowed to give them in evidence without the consent of the king, any more than, in the case of a report of the House of Lords or the House of Commons, a person would have that right, without a direct order from one or the other house of parliament. The cases cited to show that military courts of inquiry are not allowable, are not applicable: they are cases where the general body of the public might be prejudiced. But this is the trial of an individual who is an officer in the army, and who submits to the regulations of the army; for, this defendant by accepting a commission, agrees to abide by all the prerogatives which the king may have over the army; and therefore, he cannot say, if the crown has been in the habit of directing these courts of inquiry, that they are illegal. In other departments below the crown, where the conduct of particular individuals is submitted to a superior, the head of the department would have a right to inquire into the conduct of the parties under him. The archbishop of a province, or the bishop of a diocese, who had a complaint against a clergyman, would have a right to direct clergymen of the diocese to hear that complaint, and make a report to him as to the conduct of that clergyman, with a view to punishing him. A report made in pursuance of such direction would be a confidential communication,

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which the clergymen *would be bound to make; and, even if they were not bound to do so, still, if the party felt aggrieved by the report, he could not compel the disclosure of that document; because it is a communication made compulsorily in consequence of the head of the department having directed the inquiry. *A fortiori*, therefore, a report made in consequence of a direction from the crown shall not be disclosed. There are not many cases upon the subject, because the principle has never been disputed. Many cases have been quoted to show that an action will lie; but that question does not arise here. The case of *Robinson v. May* is not at all like the present; even as to the form of the action: the communication in that case was voluntary; the defendant was not desired, much less commanded, to make it: but, in this case, a command compulsory on the members of the court issues from the sovereign; and their report, therefore, is not like a voluntary communication from an individual. In *Atherfold v. Beard*, 2 T. R. 610, a wager was laid whether a local collection of the duties on hops would amount to more in the year 1785, than it amounted to in the year 1786. But the fact was not allowed to be proved, and BULLER, J., there says, "I am glad to find that in the only two cases where this question has arisen at *nisi prius*, Lord MANSFIELD and my brother ASHURST were both of opinion that the officers were not bound to produce the revenue books." The case before the court is much stronger than that of *Wyatt v. Gore*, Holt, N. P. C. 299, because it did not appear that the communication rejected as evidence in that case, arose on a proceeding ordered by the governor: it was merely some communication with the attorney-general; some conversation on the conduct of the plaintiff. If that communication was privileged, a communication consequent on the direction of the commander-in-chief, to persons *156]

sons *not competent to disobey, must be privileged. In *Cooke v. Maxwell*, 2 Starkie, N. P. C. 183, BAYLEY, J., thought evidence of orders given by a governor of a colony to a military officer, not admissible on the same grounds: but he allowed the cause to proceed, because there was other evidence. In *Anderson v. Hamilton*, (not in print,) (a) Lord ELLENBOROUGH refused to admit

(a) *J. W. Anderson v. Sir W. G. Hamilton*, knt.; coram ELLENBOROUGH, C. J., (Middlesex sittings after Hilary term, 1816.) In this case, which was an action by the plaintiff against the defendant, governor of Heligoland, for false imprisonment, the counsel for the plaintiff examined the Earl of Liverpool, who was, in November, 1810, secretary of state for the colonial department, as

in evidence the* contents of a letter written by an agent of government in one of the colonies, to Lord Liverpool, then secretary of state, or his lordship's answer. In that case, Lord ELLENBOROUGH treats all official communications as being of such a nature, that they ought not to be disclosed. At the state trials in 1794, communications of this nature were offered in evidence and rejected. The cases collected in Phillips's Evidence, vol. i. p. 294, 4th ed., generally illustrate the position that such communications ought not to be disclosed. "Then, if the original be privileged, the copy cannot be received in evidence. Proof of a fact by such copy is not proof *aliunde*, but through the medium of a copy of that which ought not to be delivered without the authority of the king himself. In many cases where a person cannot produce the original, he may produce a copy; but, if the objection to the production is that the contents ought not to be disclosed for reasons of state policy, a copy must stand excluded on the same objection."

Evans in reply. There is no difference between a soldier and any other citizen, except by the mutiny act: that act gives the king great power; but it is not too great a boon for officers to ask, that they may not be deprived of their character and commission, unless the parties against them are examined on oath. A secretary of state or governor, are in the cases put both acting legally within their authority; and the governor would be justified and the secretary of

to the contents of a letter received by the earl from the plaintiff at that time. Lord Liverpool said, that he had no recollection of the contents of the letter in question; but that he recollects receiving a complaint from the plaintiff against the Governor of Heligoland about that time, and that a correspondence took place between himself and the governor, which was on the records of the office. ELLENBOROUGH, C. J., said that the letter must be produced in the usual way, or the next best evidence be given. The counsel for the plaintiff then called Henry Goulburn, Esq., the under-secretary of state for the colonial department, who said that he had with him the letter in question, as also copies of all Lord Liverpool's letters to the defendant in consequence of the plaintiff's complaint. The counsel for the defendant then objected, as to the first letter inquired for, that it was written by the plaintiff, making a complaint against a person holding rank in one of the dependencies of the country to a person then conducting the colonial department of the government, and that it was not affected to be stated as written with the knowledge of the defendant; and, as to the rest of the evidence proposed to be given, that it was a correspondence between the secretary of state and a person acting as the representative of his majesty's government. To this correspondence the governor was no further a party than as he was called upon to communicate, in the most confidential manner, what had transpired in the island. In a private contest by an individual against that governor, the security of the state made it indispensably necessary, that letters written under this seal of confidence should not be disclosed, and that a breach of the privilege given by the law to such communications would be highly dangerous to the interests of the state. The counsel for the plaintiff observed, that they only wanted to establish the fact of the first letter being written, in order to lay a foundation for the answer; that, if they had sought to have the whole of the correspondence in evidence, the second objection might have been valid; but that the answer written by Lord Liverpool to the plaintiff, in answer to the letter of complaint against the defendant, was all that they asked, in order to prove the fact that the plaintiff did complain to Lord Liverpool; or, if that would be disclosing too much, a mere extract of that part of the answer which established that fact.

ELLENBOROUGH, C. J., said, "The answer is much more objectionable than the principal letter; for the answer is an official paper, the principal letter is only a complaint against an individual. My doubt arises on this, if the objection had been made by the noble earl to the production of this correspondence as a matter of state, I should have given the fullest effect to that objection. I remember, upon some of the state trials, Lord Grenville was called to produce some letter which was supposed to have come to his hand, having been intercepted in the course of the post, or something of that kind. I speak from recollection: I do not know whether I am correct; but upon the objection, it was thought that secrets of state were not to be taken out of the hands of his majesty's confidential servants. Now, I am very unwilling to have the evidence of what Lord Liverpool has written by way of observation on the plaintiff's complaint; for it might be used as a condemnation collateral to the facts of the case. I do not like breaking in upon this correspondence; it might be pregnant with a thousand facts of the utmost consequence respecting the state of the government, the connection of parties, the state of politics, and the suspicion of foreign powers with whom we may be in alliance. Then, it is said, the fact that there has been a complaint made against the defendant by the plaintiff to Lord Liverpool, is the only fact sought to be put in evidence on this occasion; but it is not competent to the plaintiff to get at that fact, if it be embodied in an official letter. Neither can an extract of such a letter be admitted, for the plaintiff must be entitled to the whole or none; and I think that the whole of this letter is not admissible, on account of the objections taken by the counsel for the plaintiff."

state also in refusing to disclose communications made to them in that character: but, in this case it is contended, that there is no legal power to appoint such a court as that by which the plaintiff suffered; and, therefore, it is impossible to say that the cases stand on the same footing. If the order be illegal, it cannot be compulsory, nor is it competent for the defendant to defend himself by saying that he was commanded by the sovereign. As to the assertion, that an officer voluntarily submits to this tribunal when he enters the army, he submits, when he enters the army, to the mutiny-act, to the trial by a court-martial, and nothing else. A report of a committee of the House of Lords or Commons, it has been urged, could not be received in evidence. The question of privilege is very undefined, and no authority for this position is to be found in the books:

*159] but, there is a distinction between *those houses and the king; he cannot

direct any person to be confined: they can do so. A court of inquiry is not, as has been stated, like a grand jury: the grand jury never give any opinion, save whether the party charged is to be tried or not; that tribunal is a protection to the subject: but the court of inquiry, in this case, gave an opinion, on which the plaintiff was immediately dismissed from the army. In *Sir John Mordaunt's case*, which is the most ancient, a court-martial followed the inquiry; and he complained that this court of inquiry prejudiced the subsequent court-martial against him.(a) The case of a bishop and archbishop have been brought forward, and they differ very little from the case before the court: but, no case has been cited, where a bishop or archbishop has deprived a person of his situation without bringing his conduct before a legal court. An excise officer could not be called on to produce a report concerning the revenue of the country; but there is no similarity between that case and the present. Under the circumstances put in that case, no man could have a right either to the original or the copy of such a document: but the plaintiff here was served with a copy; he was ready to produce it, and the production of it was disallowed. It has been said that the king is at the head of the army, he is also at the head of the church, at the head of the law, at the head of every thing: if he has the power contended for over the army, he has it in every other instance. It is true it will not be intended that the king will do any thing unjust; but he must act by

*160] others; and, if this power *be established, the character of every individual in the country is at the mercy of government.

DALLAS, C. J. In the argument at the bar, a great deal of matter has been discussed which does not appear to us to be connected immediately with the present subject. The only question now before us is, whether the minutes in question which were offered in evidence were properly rejected: this depends upon the nature of the proceeding; and, therefore, it is necessary to examine, in the first instance, what that proceeding was. The action in question is an action for a libel. The plaintiff was a lieutenant-colonel in the army, and a captain in the third regiment of foot guards; the defendant is a major-general, and, at the time of the transaction in question, was a colonel in the army. In consequence of certain transactions or suspicions, for I will call them by the latter name, supposed to be derogatory to the character of the plaintiff as a gentleman and an officer, his Royal Highness, the commander-in-chief, gave a direction,—which we all know is frequently given upon occasions of this sort, and, as I have no hesitation in saying, is most beneficially given,—a direction, which, instead of being the exercise of an act of severity, is very frequently the exercise of an act of tenderness and mercy to the party. Instead of bringing the plaintiff formally, and in the first instance, before a court-martial, the commander-in-chief directed an inquiry to be made, by the holding of a court for that

(a) Col. Home solicited and was promised a trial by court-martial; but the judge-advocate having twice given an opinion that the matters alleged against Col. Home were not cognizable by a military tribunal, these matters were ordered to be investigated, and were finally decided on by the assemblage of officers called a court of inquiry.

purpose. The proceeding was, therefore, in its very nature an official proceeding, directed by the commander-in-chief, for the purpose of obtaining that information, which he was bound to obtain as to the conduct of every officer holding a commission in his majesty's army, and in furtherance of the exercise of his public duty upon the result of such inquiry, whether the inquiry was to cease in the first instance, or whether the result of that inquiry was to lead [*161 to any ulterior measure. The consequence of this was, that a court of inquiry was held, of which the defendant in this case was the presiding officer; that court of inquiry was held in consequence of a duty created by the order of the commander-in-chief, which was imperative upon him; and a report made by the defendant, in conjunction and connexion with the officers, was an act of duty imposed upon him as a military man, by his superior commander, the commander-in-chief, whose order he was bound to obey. We have heard a great deal in this case, concerning the nature of the proceedings of a court of inquiry. Whether these courts were first held in the year 1757, or preceded that year, is to me perfectly immaterial in my view of the case; for we all know that, considering to what a height of greatness and glory the armies of this country have risen, from that time up to the hour when this court of inquiry was held, the convenience, at least, of this practice has been such, that no man has ever been deterred from entering into the army on that account; and it is quite impossible not to see, that the plaintiff in this case, when he did become an officer in the army, knew, that, in point of fact, he voluntarily subjected himself to that court of inquiry, to which he must have known that officers in other instances had been made amenable.

The evidence in question was the result of the inquiry made by the court, delivered by the defendant to the commander-in-chief, in the exercise of his military duty, and retained by the commander-in-chief, as an official document, in the possession of the secretary, Sir Henry Torrens. It originated, therefore, in a military order of a person holding a high and responsible office under the crown; it was executed in consequence of that order; it was returned and deposited in that place in *which all official acts of such a description are to be deposited; and the question, then, is, whether, under these circumstances,—I will not say Sir Henry Torrens would have been compelled to produce the result of this inquiry;—but, whether, if he, under a mistake, had been disposed so to do, it would not have been the bounden duty of the learned judge before whom the cause was tried, considering that this document was a secret, not the privilege of the party holding it, but of which he was a trustee on behalf of the public, to have interposed and prevented the admission of such evidence. Now before I examine the few instances alluded to as applying to cases of this description, let us see upon what ground and principle the present case rests. It is agreed, that there are a number of cases of a particular description, in which, for reasons of state and policy, information is not permitted to be disclosed. To begin with the ordinary cases, and those of a common description in courts of justice. In these courts, for reasons of public policy, persons are not to be asked the names of those from whom they receive information as to the frauds on the revenue. In all the trials for high treason of late years, the same course has been adopted; and, if parties were willing to disclose the sources of their information, they would not be suffered to do it by the judges. What is the ground, upon which these cases stand, except it be the ground of danger to the public good, which would result from disclosing the sources of such informations?—for no person would become an informer, if his name might be disclosed in a court of justice, and if he might be subjected to the resentment of the party against whom he had informed. Does not this reasoning apply closely to the case now before us? This is an inquiry directed to be made by the commander-in-chief, with a view to ascertain what the conduct of the party suspected might have been; in the course of which, a number of persons may be

called before the court, and may give information as witnesses, which they would not choose to have disclosed : but, if the minutes of the court of inquiry are to be produced in this way, on an action brought by the party, they reveal the name of every witness, and the evidence given by each. Not only this, but they also reveal what has been said and done by each member of the existing court of inquiry. It seems, therefore, that the reception of the minutes would tend directly to disclose that which is not permitted to be disclosed ; and, therefore, independently of the character of the court, I should say, on the broad rule of public policy and convenience, that these matters, secret in their natures, and involving delicate inquiry and the names of persons, stand protected.

The only case which has been referred to, as a case more immediately in point, is that which was decided by Lord Chief Justice Gibbs, (a) and there, the witness proposed to be examined, was the attorney-general of the province, who was called, and asked as to the nature of some communications made to him by the defendant relative to Mr. Wyatt's conduct. Mr. Serjt. *Lens*, for the defendant, objected to this evidence, "that it would be highly indecent for a public officer to disclose what passed between him and the governor upon that occasion ; and that it was a confidential communication."—What was this report, in its very nature, but a confidential communication, in consequence of a direction by the commander-in-chief, for the information of his own conscience in the exercise of his public duty, as to whether he should suffer the plaintiff to continue an officer or not ; in a case, in which it must be agreed and admitted, that, *164] independent of any inquiry whatever, "his majesty, in the exercise of his prerogative, might have dismissed him at any time ?"—Then, in deciding on the validity of the objection, the chief justice said, "The witness is not bound to answer ; and, in delicacy he will not answer such questions. Whether the conversations, in which reference was made to Mr. Wyatt's conduct as surveyor-general were on public or private business, they ought not to be disclosed. The governor consults with a high legal officer on the state of his colony ; what passes between them is confidential : no office of this kind could be executed with safety, if conversation between the governor of a distant province and his attorney-general, who is the only person upon whom such governor can lean for advice, were suffered to be given in evidence."—Now, what is this proceeding, but consulting with those who are bound to give the advice which is required, as to the exercise of a public duty ? and, whether the case be that of the attorney-general of a province advising the governor, or of an officer present at a court of inquiry directed to be held by the commander-in-chief, it is equally a case of advice and information, given for the regulation of a public officer. It seems, therefore, to us, upon the broad principle of state policy and public convenience, and upon the principle of all the cases cited, that the chief justice of the Court of King's Bench was perfectly right, in not suffering these minutes to be brought forward at the trial. This judgment must be, consequently, affirmed.

Judgment affirmed.

(a) *Wyatt v. Gore*, Holt, N. P. C. 299.

JOSHUA ROWE, Esq. v. ISAAC YOUNG.

If a bill of exchange be accepted payable at a particular place, the declaration in an action on such bill against the acceptor, must ever presentment at that place, and the averment must be proved.

The defendant in error was endorsee, and the plaintiff in error was acceptor of a certain bill of exchange, dated the 20th December, 1815, drawn by James

Meagher, at Gosport, upon the plaintiff in error, at Torpoint, requiring the plaintiff in error, two months after the date of the bill, to pay to the order of James Meagher, the sum of 300*l.* value in account, which bill was accepted by the plaintiff in error, payable at Sir John Perring's and Co., bankers, London, and endorsed by James Meagher, to the defendant in error; and which bill, when the same became due, was dishonoured and unpaid. Whereupon the defendant in error, after the said bill was dishonoured, commenced this action in the Court of K. B., and in Trinity term, 56 Geo. 3, obtained judgment upon demurrer, against the plaintiff in error, as the acceptor of the said bill of exchange. The first count of the declaration in the action was framed upon the bill of exchange as above described; but the declaration likewise contained all the money counts, and concluded with the common breach. The plaintiff brought error returnable before the lords in Parliament, and

The special error was, that it was not stated nor averred in or by the first count of the declaration, that the bill of exchange was ever presented for payment at the said Sir John Perring and Company's, at which place the said bill of exchange was, by the acceptance, made payable.

The defendant joined in error; and in Trinity term last and the subsequent vacation, the case was argued *by the attorney-general and Wilde, for the plaintiff in error; and Holt for the defendant in error. [*166 (a)

On the conclusion of the argument, the lord chancellor desired to have the opinion of the twelve judges upon the four following questions:

First, Whether, in this case, the bill of exchange mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir John Perring's and Co., bankers, London, (that is to say,) at the house of certain persons using in trade and commerce the names, style, and firm of Sir John Perring and Co., bankers, London, the holder was bound to present it to that house for payment, and to aver in the declaration that the same was presented to that house for payment?

Secondly, Whether the said bill, having been so accepted as aforesaid, such acceptance is, in law, to be considered a qualified acceptance, to pay the same at the said house of Sir John Perring and Co., bankers, London; or, as a general acceptance to pay the same, with an additional engagement or direction for payment thereof at that house?

Thirdly, Whether, if A. draw a bill upon B. in favour of C. for 100*l.*; and C., without the previous authority or subsequent assent of A. take an acceptance of the bill for the whole of the 100*l.*, but an acceptance qualified as to the time or place of payment; C. could, notwithstanding his taking such acceptance, maintain an action upon the bill against A.?

Fourthly, Whether, if A. were debtor to C. in 100*l.*, previous to his so drawing upon B., in favour of C., *to the amount of 100*l.*, C. could, upon A.'s refusing his assent to an acceptance, qualified as mentioned in the above question, maintain an action upon the original debt against A., without delivering to A. the bill so accepted, in case, at the time the bill was drawn, B. was also indebted to A. in a like sum of 100*l.*?

There being a difference of opinion among the learned judges, they subsequently delivered their opinions on these questions *seriatim*; (b) and on the 17th July the lord chancellor (c) and Lord REDESDALE expressed the following opinions.

The lord chancellor (after stating the record). My lords, the writ of error in this case brings before your lordships the question, whether it was or was not necessary, in the first count of the declaration, to allege or state expressly, or

(a) The reasons, arguments, and cases cited on both sides are so fully discussed in the lord chancellor's opinion, and in the opinions delivered by the twelve judges to the House, that it was deemed unnecessary to insert them here.

(b) See the Appendix to this case.

(c) Lord Eldon.

to allege or state in substance and effect, so that it might be collected from the first count of the declaration, that the bill had been presented and shown to the plaintiff, either when it became due and payable, or before that time, or since that time, at Sir John Perring's and Co., bankers, London : and that question may be stated in another way, namely, whether this acceptance, as stated in the first count of the declaration, is to be taken to be a general acceptance, making the party accepting liable to pay every where ; or, whether there is (what in some cases is called an expansion of the undertaking, and in other cases is called an engagement or direction in addition to the general unqualified acceptance to pay,) a direction and engagement to pay at Sir John Perring's and Co., thrown in for the convenience of both parties, but which the holder of the bill is not bound to attend to unless he chooses ; or, on the other hand, whether this, upon looking at the terms of the declaration, is what is in law called a qualified acceptance ? *168] And, my lords, undoubtedly, it is very fit this question *should be brought before your lordships ; because the state of the law, as actually administered in the courts, is such, that it would be infinitely better to settle it in any way, than to permit so controversial a state to exist any longer.

It has been stated at the bar, and there can be no doubt that it has been there correctly stated, that the Court of King's Bench has been, of late years, in the habit of holding such an acceptance as this to be a general acceptance, with what the judges of that court call an expansion, or a direction, or an engagement, which introduces, not a qualified promise, but a sort of courtesy, a kind of accommodation between the parties, in addition to the effect of the general acceptance ; to which accommodation or courtesy, however, they hold, that the holder, of the bill is not at all bound to attend. On the other hand, it has been stated to your lordships, and there can be no doubt of the fact, that the Court of Common Pleas is in the habit of holding, that such an acceptance as this is a qualified acceptance, and that the contract of the party is to pay at the banker's ; and, of holding it as matter of pleading, that presentment at the place stipulated must be averred, and that evidence must be given to sustain that averment. It has been further represented that, although, in the present state of the law, the principles of law, as applied to promissory notes and bills of exchange are simple enough in common cases, the Court of King's Bench has held, that if a man promise to pay at a particular place by a promissory note, (at the Workington bank, for instance,) the presentment, which is, in point of law, a demand, must be made there, because the place stands in the body of the note, and, being in the body of the note, it is part of the written contract which must be declared upon, as it exists, and proved as declared ; but, that, in the case of bills of exchange, the same court has held, that the place at which by its acceptance a bill is made *169] payable, is *not in the body of the bill : and, not being in the body of the bill, the court has taken it for granted, that it is not to be considered as being in the body of the acceptance, a conclusion, which it is extremely difficult, I think, to adopt ; because it seems hard to say, that combinations of various kinds may be infused into the acceptance, (for example, qualification as to time, as to mode of payment, as to contingencies, upon which the acceptor will pay, and various other qualifications which will be found in the cases,) which they unquestionably may be, notwithstanding the generality of the bill as drawn, but that, if the acceptance contain a qualification clearly and sufficiently expressed as to place, that qualification ought not to be introduced into the acceptance.

In addition to being told that the decisions of the Court of King's Bench upon bills of exchange cannot be reconciled with the decision of that court upon promissory notes, your lordships are told, that the decisions of that court upon bills of exchange are not all consistent with each other. It is a little difficult to say that they are ; but, undoubtedly, it may be represented as the opinion of that court in judgment, that this species of acceptance is a general acceptance, with that kind of expansion, direction, or engagement, to which I have been alluding.

The Court of Common Pleas being of a different opinion, it is impossible, my lords, for any man to feel that he has incumbent upon him the duty of giving the best opinion which he can form upon a question, on which so many men of high professional character and great professional learning have differed, without giving that opinion with a good deal of diffidence ; but he must remember that it is his duty to give his opinion, whatever it may be.

The first question is, whether this is a qualified acceptance. Upon that question, the twelve judges have given your lordships their opinion, and a great majority *of them are of opinion that it is a qualified acceptance. Some of the judges have given your lordships their opinion, that it is a general acceptance with an expansion, direction, or engagement for the convenience of one or other of the parties, which, one does not very well know ; and that the acceptance meant, that if the holder chose to go to Sir John Perring's and Co., he would probably there get payment of the bill. Then, another question is this, supposing this to be a qualified acceptance, was it necessary to aver the presentment in the declaration, and to support that averment by proof ? A great majority of the learned judges (including some of those who thought this a qualified acceptance) say, that it is not necessary to notice it as such in the declaration, or to prove presentment ; but, that it must be considered as matter of defence, and that the defendant must state himself as ready to pay at the place, and to bring the money into court, and so bar the action, by proving the truth of that defence. Some of the judges, to whom I am alluding, (having been most eminent in special pleading,) deny this proposition, and say, that the plaintiff must declare upon the contract as it is, that he must make out his right to sue, according to that contract ; and, if that contract engage for payment at Sir John Perring's and Co., he must state in the declaration, that he has demanded payment at Sir John Perring's and Co. : in short, their opinion is, that the plaintiff has no cause of action, unless he have performed his part of the contract.

I think, my lords, I may venture to state, upon the cases which I have taken a great deal of pains to search, (for I hope I have read every case upon the subject,) that a person may, undoubtedly, draw a bill of exchange, as we are in the habit of making a promissory note, payable at a particular place : the effect is, that the acceptor of such a bill has promised to pay at that particular place, and that the drawer, on default of the acceptor, has promised to pay *at that particular place ; but there seems a great objection made to the doctrine, [*171 that, if a drawer has drawn generally, the acceptor can accept specially. The question appears to me to be, whether the acceptor has accepted specially ; and I cannot imagine, if the contract of A., (he being the drawer) be general, how it is from thence to be reasoned, that I, the acceptor, need not come under any engagement, unless I choose to come under the engagement proposed by A., and that I cannot qualify my acceptance, and say to the holder of the bill, it is very true, the drawer has drawn upon me, and expects me to make myself liable generally ; but that is not what I choose to do ; if you will not take an acceptance from me, by which I can consult my own convenience, by telling you that I will pay you at a given place and time, you shall have none at all. Cannot an acceptor accept in a qualified way ? That he can, is clearly established by cases which extend to almost every species of qualification ; and, unquestionably if the qualification as to place cannot be adopted by the acceptor, it must be on account of some circumstance which belongs to the place, and does not belong to the time or the mode of payment, or any other species of qualification whatever My lords, I am ready to express my full assent to the doctrine, that, where a bill is drawn generally, (considering that as an address to the person who is to accept it generally, because it is drawn generally,) it lies upon the acceptor, who says, that he has accepted specially, to accept in such terms, that the nature of his contract may be seen from the terms he has used, and that that may clearly appear to be a qualified acceptance, which he insists is not a general acceptance.

The first question, then, here, will be upon the words, whether this is or is not a qualified acceptance. Now, my lords, I really do not know how it is possible to say, that this is not a qualified acceptance; I mean independent *172] of the cases which have been decided; because, if a man draw upon me who am living in London, and I say, I accept according to the usage and custom of merchants, payable at my bankers, Child's and Co., London, I only desire to ask, (putting the usages of merchants, and putting the effect of these cases out of the question, for a moment,) whether any man could read an acceptance of mine in these terms, and say that it was, not only an acceptance of mine, payable at Child's, where those funds would be, which were to pay it, but that it was an acceptance by virtue of which (as is admitted by those who have argued about the convenience and inconvenience, and who have looked at the *argumentum ab inconvenienti*) the holder of that bill might arrest me, and hold me to bail in any part of the world. My lords, after revolving this question again and again, in my mind, with the full consideration of what has been stated about the practice and contrary decisions, I cannot say that it was not the intention of the party who thus accepted, to come under an engagement, which may be represented as an acceptance to pay the bill at Sir John Perring's and Co., London.

Then, it is said, that the word "accepted" forms the general engagement, and that the words "payable at Sir John Perring's and Co." cannot qualify, and cut down the general engagement; and cases are then cited, which maintain a distinction between words of qualification in the body of a note, and words of qualification in the margin, or at the foot of a note; and there are cases maintaining the distinction, that if such words be in the body of the note, they form part of the contract; but if they be at the foot, or in the margin, they form only a memorandum. I do not mean to disturb these cases at all, but I do not understand how it is, that from these cases it is to be inferred, that, when I write the *173] words "accepted, payable at a given house," the word "accepted" is to be taken to express the whole of my contract, and that, though the sentence is not complete till I write the whole, the latter part of it is not to be taken as part of the contract, but as a direction, or expansion, of the engagement. Your lordships have heard a great deal of this *argumentum ab inconvenienti*, but I cannot help thinking, that this is a mode of reasoning, which is not quite analogous to our usual modes of reasoning in the courts below on the question of what men are likely to do or not to do. The case is put in this way.—Supposing bills were drawn on each of the twelve judges of England, just before they left town on the circuit, and they had accepted the bills, payable at their respective bankers, if it be law that such an acceptance renders them liable to pay anywhere, the holders of those bills might undoubtedly, if they pleased, arrest the judges at their respective circuit towns, a little to the inconvenience of the administration of justice.—It is said, no man would think of arresting the judges. My lords, I hope nobody would think of arresting the judges; but I can feel for mercantile men, just as well as I can feel for judges, and I can feel for men exposed to the inconvenience of demands upon them which are to be regulated not by their contracts, but by a construction being given to their contracts which they meant should be never given to them. My lords, in this very case, (and it seems not to have been very much considered,) the acceptor is at Torpoint; and, having his money in London, where it is usually demanded of him, he says, If you make your demand upon me, here, I cannot pay you; but I have at Child's or Drummond's shop money to pay you, and you will be sure to find it there. Is it no matter of inconvenience, that such a man may, from caprice, if you please, (and we have heard of such things, as men through caprice refusing a tender of Bank of England notes, and so forth,) be obliged to bring the *174] money from London: or is he to keep money in London and at Torpoint too, to answer the exigency of the demand, as it may happen to be made at the one place or the other.

My lords, there is another consideration, which does not appear to me to have been so much attended to as it might have been, namely, that, if I promise to pay at my bankers in London, and a man calls upon me to pay in Northumberland, it is not the same thing ; for, looking at the demand as likely to be made at Child's shop, I send the money there, but, if I am to pay in Northumberland, there must be the exchange, and remittance, and so on, backwards and forwards. But take the case of a gentleman leaving Calcutta, and coming to reside in London, who gives a bill of exchange in Calcutta, to be paid there, six months after he departs : he arrives in London, not bringing a shilling home to pay that bill,—he finds the bill sent home by another ship, and he is arrested the moment he lands. Is the sum which he is obliged to pay here, the same with that which he would have paid there, and for paying which, he had made preparation ? Certainly not.—It appears to me, therefore, that, even with respect to the value of what is to be paid, there is a most essential difference in the contract.

Then, it is said, this will be extremely inconvenient ; and it was with a view to see what the balance of convenience and inconvenience would be in that part of the case, that I took the liberty, with your lordship's permission, to put the third and fourth questions to the judges. It is said this may vary the right of the holder, in respect of the drawer, unless he the holder give notice, and so forth, to keep his liability alive. My lords, the answer to that, as it seems to me, is this, that if you once admit that a man may accept specially, it is the consequence of the law, that these difficulties arise : if you will say that "no man shall accept specially, a bill which is drawn generally, that settles [*175] the question ; but, if you say that the law is—though a man draw generally, the drawee may accept specially,—it is the consequence of the law which imposes duties upon the holder to give notice to the drawer, to keep alive the drawer's liability, and that inconvenience certainly is not quite so large as if the acceptor refused to accept at all.

Then, it is said, that this will impose great difficulty on the endorsee, that a person sometimes becomes an endorsee before, and sometimes after acceptance ; if he become an endorsee before, he may find a special acceptance when he expected to have a general acceptance ; but then, when the bill endorsed to him unaccepted, he does not know whether it will ever be accepted ; and, if he do not know whether it will be ever accepted, he cannot tell whether it will be accepted specially. He knows, therefore, at the time of taking that bill by endorsement, that he is to look out for such an acceptor as he can find. What is there inconsistent with the rule of law or convenience in this ? I cannot see any thing.

It would be a very unnecessary fatigue to your lordships to go through the whole of this case from the beginning to the end. It does appear to me that no one can say, the case is settled in law ; you must therefore go back to principle. If you go back to principle, and admit that a man may give a qualified acceptance, the question is, whether this is a qualified acceptance, ay or no ? If it be a qualified acceptance,—if it be an acceptance where the contract of the party is to pay at Sir John Perring's and Co.,—then I state it to be in pleading settled matter, that you must declare according to the contract, and that you must aver all that the nature of that contract makes necessary. If that be so, if it be a special contract, and if it be necessary *for you to aver all which the contract contains, how can it be said that it is not to be shown in the nature [*176] of the demand, but that it must be left to be shown in the defence ? It appears to me that this position cannot be maintained. My lords, with respect to the cases of bonds which have been cited, they differ, altogether, from a contract of this nature. You bring your action upon a bond for the penalty ; it must, therefore, be matter of defence to say, that the bond would have been paid at a particular place ; for that will be in the condition of the bond ; when you pray *oyer* of the bond, you defend yourself by saying that you have performed that condi-

tion, and, that, therefore, you are to be excused from the payment of the debt. These cases, therefore, have no application to the case before your lordships.

There is another set of cases, in which it is said, that, if there be an antecedent debt, the acceptance must be taken to be general.—Between the acceptor and holder there is seldom an antecedent debt; there may be an antecedent debt between the drawer and acceptor of the bill; I wish that there had been an antecedent debt in all cases, for accommodation bills have been the ruin of many: but, with respect to the acceptor, it is not true, that he must be antecedently the debtor; and all the cases with respect to qualified acceptance show that; for a man may accept to pay half the bill in money, and half in goods; he may accept to pay out of the produce of a cargo consigned to him when that cargo comes to this country. When your lordships look to the situation of a consignee, you will find that his acceptance is always qualified. A ship's cargo comes from the West Indies, and the bill with it; the acceptance of such bill will be, of course, an acceptance to pay in London.—In every view of this case, I take the liberty to state to your lordships as my opinion, (certainly stating it with infinite diffidence, as I ought, *recollecting that I am obliged to differ in opinion from those whose judgments no man can respect more than I do,) that this is a contract to pay at Sir John Perring's and Co., which is not the contract stated in the first count of the declaration; for that count wants that averment; and the consequence is, that the judgment of the Court of King's Bench must be reversed. I do not think that it will be of the least consequence to the commercial world; for it will be so easy to adopt forms of words which leave no doubt as to what is meant, that I am perfectly sure, if there were any inconvenience arising from the decision, if your lordships think proper to make it, that those, who do not wish to have the inconvenience have nothing to do but to use two or three words, which will guard them from it. But the question is, What is the law of this day, upon this contract, as set forth in this first count of this declaration? I have already stated to your lordships in a few words what my opinion is, and I sincerely believe it to be founded in clear principles of law; although, when I state that I do believe it to be so founded, I cannot but recollect, (and I do that with infinite respect,) that I am differing in opinion with those, whose opinion is infinitely superior to mine. But my duty is not to state their opinion, but to express my own.

Lord REDESDALE. My lords, I most fully concur in the opinion expressed by my noble and learned friend. It does appear to me that some of the learned judges have totally forgotten acceptances for honour. If a person accept for the honour of the drawer, payable at a banker's in London, all the reasoning founded in the supposition, that the acceptor must be debtor to the drawer vanishes; and I do not observe, that the learned judges distinguished between the case of an accept-
*178] ance *for honour, and the case of a common acceptance. It is impossible to say, if these words were applied to an acceptance for honour, that any of the arguments founded on the supposed prior debt of the acceptor could be maintained.

But, my lords, another part of the question which has been adverted to by the noble and learned lord, appears to me of infinite importance, I mean the acceptance of a bill payable at a place different from the residence of the acceptor. This bill is accepted by a man resident at Torpoint, payable in London, at a certain banking-house. What is asserted to be the effect of this acceptance? That he engages to have money both at Sir John Perring's and Co., and at his own residence at Torpoint. If he accepted simply, he would engage only to have the money at Torpoint; but it is said, that, because he accepts with this addition, he engages to have the money at both places. This is making him engage for two things instead of one, and it does seem to me, that it must have been his intention to engage for only one, namely, a payment in London; for it is perfectly clear, that payment at Torpoint, and payment in London, are two

different things : and, if he be liable to be called upon at both places, his liability is rendered more inconvenient.

This might be converted into a most fraudulent transaction, in reference to dealings between mercantile people residing at different places. Take the case alluded to by the noble and learned lord, of a bill accepted payable at Calcutta. Suppose that a person accepts a bill payable in India, and leaves funds for the purpose of answering that bill, the bill being payable in six months ; he comes to London, and there the bill is demanded of him because his acceptance is general, and the words "payable at Calcutta" do not qualify that acceptance. The *consequence of that would be, that the holder of the bill would gain [*179] the whole expense of the remittance from India to England, and we know perfectly well that that makes a very considerable difference. In an appeal very recently before your lordships, it was a question, whether in an account of that description, the expenses of remittance from India to England are or are not to be allowed ; and it is part of the subject of appeal from a decision of the Court of Session in Scotland, that the appellant has not been allowed the expense of that remittance. It appears to me, therefore, that it is perfectly clear, that, if it were to be held, that the acceptance of a bill payable at a different place, is not to be held to be conditional acceptance, it may be used for the purposes of extreme fraud, to make a man pay that, which he did not mean to pay, and which the drawer did not expect him to pay in such a mode. Many cases might be put as to the West Indies, and other places, which were attended to by some of the learned judges, and into which it is not necessary to enter. If the words which have been added to this acceptance be construed, as having no operation in favour of the acceptor, how came they to have any operation whatever in favour of other parties ? If they be not a condition annexed to the acceptance, how can it be granted, that the holder of the bill must, in order to entitle him to make a demand either against the drawer or against the endorser, show the bill to Perring and Co.? But, it is said, that this should be shown in the plea : the majority of the judges have been of opinion, that it is a qualification of the acceptance, but that the party is to take advantage of it in pleading. But, in order to do that, he is obliged to bring the money into court, (that is to say,) he is to do the very thing which, (in the case of an acceptance in India, for instance,) he ought not to be obliged to do, for, in that case, the acceptor must *bring [*180] the money from India, to be enabled to bring the money into court. Upon these grounds, it appears to me, that it is infinitely better to hold, that these words do amount to a qualification of the acceptance imposing a precedent condition, which must be shown upon the record, for the purpose of setting forth truly the acceptance, and, that being set forth, it appears to me, that the party is bound to prove that which he has averred in the declaration, which goes to show, that the party taking such acceptance, has complied with the condition entered into between him and the acceptor. On these grounds, I perfectly concur with the noble and learned lord, that the judgment should be reversed.

The House, accordingly,
Reversed the judgment.

APPENDIX TO ROWE v. YOUNG.

BEST, J. Upon a question of such acknowledged difficulty as that, which is first proposed to us by your lordships, one, on which the most eminent judges have pronounced directly opposite decisions, I address your lordships with the utmost diffidence of my own judgment; but my duty to your lordships prevents me from yielding to the difficulty which I feel; and obliges me

to form the best opinion, that a consideration of the question with the greatest attention which I can apply, enables me to give.

I submit to your lordships, that the words "payable at Sir John Perring's and Co., bankers, London," qualify the general term "accepted," and render a presentment of the bill at the house of Sir John Perring and Co. necessary; (provided the acceptor had funds at that house on the day on which the bill became due, and Sir John Perring and Co. would have paid the bill;) but I do not think that it was necessary to aver in the declaration that the bill was presented at that house for payment. If the acceptor would avail himself of the want of presentment of the bill at Sir John Perring's, he must plead to the action brought on it, that he had funds in the hands of Sir John Perring and Co. sufficient to take it up on the day when it became due, and that Sir John Perring and Co. would have paid it, had it been presented at their house; and he must pay the amount of the bill into court.

*181] The first point to be settled is, whether the terms used amount to such a qualified acceptance as makes the bill payable *only* at the bankers'; or whether they are to be considered, merely, as giving notice to the holder, that, if he will call at the bankers', he may obtain payment, without having the effect of compelling him to present the bill at the bankers', or imposing any other duty on him, than what is required from the holder of a bill by a general acceptance.

Before I discuss this point, I would state, that, in my humble opinion, it imports the holder of a general acceptance to present his bill at the residence or place of trade of the acceptor: the qualified acceptance produces no other effect than that of changing the place of presentment from the counting-house of the acceptor, to the house of the acceptor's banker.

It cannot be disputed that the drawee of a bill may accept it specially; and that such acceptance may narrow his responsibility below what it would have been, if he had accepted the bill according to its tenor. Special acceptances are recognised by a long series of decisions of all the courts of Westminster Hall, from which it appears, that the drawee of a bill may limit his responsibility by any conditions which his own circumstances, or the situation of the drawer's funds may render expedient. In *Smith v. Abbot*, Str. 1152, it was holden that a drawee may accept, payable when certain goods consigned to him are sold; and, in *Julian v. Shobrooke*, 2 Wils. 9, when in cash from the cargo of the ship *Thetis*. In *Walker v. Atwood*, 11 Mod. 190, a bill payable at sight was accepted payable three months after acceptance, and this was held to be a good conditional acceptance. If the time of payment may be postponed, the place of payment may be changed. It is another question, whether the holder is bound to take such an acceptance, and whether, if he take it without giving

*182] notice to the *drawer and endorsers, and obtaining their assent, he does not discharge them from all liability; but, if he does receive such an acceptance, he is bound by the terms of it, as between himself and the acceptor.

The next point to be considered is, are the words "accepted payable at Sir John Perring's and Co. bankers, London," sufficient to express a special acceptance, making the bill payable at that house? They all form one short sentence; the words "payable at" following immediately after the word "accepted" without any break; and, as the word "accepted" raises an obligation in the writer to pay the bill when due; the words which follow "accepted" must be considered as confining the obligation to pay at the house of Sir John Perring and Co. What rule of construction allows us to say that the first of several connected words is to be considered as forming the contract, and that the remaining words, although they seem to express a qualification of such contract, are to have no effect? With what justice can we hold a man to the obligatory part of the instrument which he has executed, and refuse him the advantage of the qualification which he has immediately annexed to it?

But, it has been said at the bar, that the acceptor is to be presumed to be the

debtor of the drawer; that the debtor is liable to his creditor every where; that this liability cannot be narrowed, except by clear and express terms; and, that the terms used by this acceptor are not sufficiently clear to narrow his responsibility. I deny, that, under the circumstances in which the trade of the world is now conducted, a drawee is to be taken as the debtor of the drawer; but, if he is to be so taken, the drawing a bill for his debt, if it be accepted, restrains the drawer from claiming his debt at any other time or place (in the first instance) than when and where the bill is payable. Further, I insist, that the terms used in this acceptance are sufficiently clear to fix the place of payment of this bill at the house of the bankers.

It is well known to be the practice of the consignors of goods, to draw on the consignees for the expected proceeds of such goods as soon as the goods are sent. The bills so drawn are, often, presented before the goods get to the hands of the consignees, and, generally, before they are sold. The special acceptances, in some of the cases to which I *have referred your lordships, were evidently made under these circumstances. In those cases, [*183] the drawee is no debtor of the drawer; nor can what is said as to the narrowing of a general liability down to a particular liability, have any reference to them.

But, suppose the drawee to owe the drawer money, for which the former is liable to be proceeded against at any time and place, and without notice. At the moment when the one has drawn, and the other accepted, a bill, the general right to sue which the drawer before had, is, in consideration of the acknowledgment of the debt and the security given for it by the acceptance, restrained: and the drawer can have no action until the bill is arrived at maturity, and the drawee (if able to pay) has been requested to pay it. I know, as against an acceptor, it is not necessary to aver a prior presentment of the bill; but, although such averment and proof be not required, I cannot persuade myself that you may arrest an acceptor who has been always ready to pay his bill, without any notice of the person in whose hands it is. The opinion, that an acceptor may be sued at any time and place, and without any other demand than the writ, has arisen from inattention to the forms of pleading. I shall, presently, endeavour to explain this matter. I am aware that there is great authority for this doctrine; but no authority, save that of your lordships, will ever convince me that it is part of the mercantile law of England. If this be the law, no merchant in the city of London can secure himself against arrests and the costs of vexatious actions; having money constantly in his house equal to all that he has to pay, and even carrying a like sum with him wherever he goes, will not protect him. According to this doctrine, the debt may be sworn to by the holder previous to any application for payment, and the first demand be made by a sheriff's officer. The acceptor of a bill seldom knows in whose hands it is when it becomes due; the holder is, frequently, at a considerable distance from the place of payment, and sends his bill to an agent unknown to the acceptor. The acceptor cannot do what other debtors may do, namely, seek out his creditor and tender him his debt. The law will not require impossibilities; and all that it is possible for an acceptor to do, is to be ready with his money at the time and place of payment.

*As to the objection of want of precision in the terms used; let it be [*184] recollected that this is a mercantile contract, and, that the loosest of all mercantile contracts is the acceptance of a bill of exchange. By the use of the single vague term "accepted," the drawee engages to pay the bill when it arrives at maturity: there is nothing like precision, nothing like a clear and unequivocal expression of obligation in this term, yet the acceptor is bound by it. Will you require more clearness and precision in the qualification, than in the contract to which it is annexed? But the words, however inartificial, are only capable of one meaning; nor would any man reading the bill, and not

puzzled by the decisions of Westminster Hall, think of putting any other construction upon them, than, that the payment which the acceptor binds himself to make, is to be made at the house of his bankers, and no where else. Suppose, instead of using the word "accepted," the drawee had written "when this bill becomes due, I undertake that it shall be paid at the house of Sir John Perring and Co., bankers;" could any man contend that, according to these words he would have to be ready to pay it at any other place than the house of Sir John Perring and Co.? The words "accepted" imports, that, when the bill becomes due, the acceptor undertakes that it shall be paid: surely, the words, "at Sir John Perring's and Co.," must have the same meaning, when added to the word "accepted," as, when added to other words meaning nothing more nor less than is expressed by the word "accepted." It has been asked at the bar, how long the acceptor is to leave the amount of the bill in the hands of his banker? I answer, that he is never to remove it. By his special acceptance, he has charged that money with the payment of the bill at his banker's: he has, therefore, no power over the amount left at his banker's to pay it; it belongs to the holder of the bill, who may take it when he pleases. Should he not call for it within the time allowed to the holder of a banker's check to present the check at the banker's, and should the banker fail, the holder of the bill must lose his money: he would lose his money if he took a check for his bill, and did not present such check in due time. It is decided in the case of *Saunderson v. Judge*, 2 H. Bl. 509, that a memorandum *185] that a note would be paid at the house of Saunderson and Co. was an undertaking that there should be cash there to pay the note; and an order on Saunderson and Co. to pay it. Your lordships also know, that such an acceptance as is stated in your lordships' question is treated by all bankers as a draft on them or order to pay the bill so accepted. A person who neglects to present such an acceptance on the day when it is due, must, therefore, subject himself to the same consequences as one who keeps any other draft or a banker's check beyond the day after that on which it was delivered to him, when the banker fails.

With respect to the cases of *Smith v. De la Fontaine*, Bayley on Bills of Exchange, 3d ed. p. 129, note b., *Fenton v. Goudry*, 13 East, 459, and the *nisi prius* decisions which followed those cases; I am far from saying, that the judgments of the courts upon those cases were wrong; on the contrary, for the reasons which I shall presently offer, I should have concurred in those judgments, although not on the grounds stated by the judges who decided them. As to the *nisi prius* cases, I think it would have been much better for the law, if the crude opinions of judges at *nisi prius* had never been allowed to be quoted to those who are sitting in bank. Of *Smith v. De la Fontaine*, we have only a very short and very imperfect report: it does not appear that Lord MANSFIELD, or the Court of K. B. looked at the acceptance as a written contract, and considered what was the true legal construction of it. They proceeded upon some supposed understanding of the mercantile world, and did not give themselves the trouble of coming to any understanding on the subject. Lord ELLENBOROUGH and the rest of the judges seem to have taken the same course in *Fenton v. Goudry*. Where a construction is to be put on a mercantile contract, the court do right to consider what has been the practice of merchants with reference to such a contract. But care must be taken to ascertain what the practice is, and I cannot think any court warranted by the opinion of one jury in pronouncing, that words which are incorporated in a contract form no part of it. It does not appear that any inquiry *was ever made *186] to learn the understanding of merchants on this subject, except by Lord MANSFIELD in *Smith v. De la Fontaine*.

I come now, to the second branch of your lordship's first question; namely, whether it is necessary, in an action on such a bill, to aver in the declaration,

that the same was presented at the house of Sir John Perring and Co. for payment. I am aware that both the King's Bench and Common Pleas seem to agree, that, if the terms of an acceptance are obligatory on the holder to present the bill at the banker's, such presentment must be averred in the declaration. With the greatest respect for those who were judges of the King's Bench at the time when those cases were decided, I must say, much confusion seems to have prevailed amongst them on this subject. Lord ELLENBOROUGH, in his judgment in the action on the promissory note made payable at a particular place, *Sanderson v. Bowes*, 14 East, 500, answers his own argument in *Fenton v. Goudry*: nor can I subscribe to the propriety of the distinction taken by his lordship and some other of the judges, between the effect of the same words in a note and a bill. In an acceptance, the words form a part of the original contract of the acceptor, as much as they form a part of the original contract of the maker in a note. In the Common Pleas, the question of pleading does not seem to have been much considered. It was scarcely put to that court by the argument at the bar, that the objection of want of presentment ought to have been made matter of defence. If presentment at the banker's be not a condition, the performance of which must precede the payment of the bill, there is no necessity for averring such presentment in the declaration. By a general acceptance, the acceptor undertakes to pay the bill in London; but it has never yet been thought, that before you can recover against the acceptor, you must show a presentment on the day the bill became due. I cannot distinguish between the time of payment and place of payment, or discover any other difference between a general acceptance and a special acceptance payable at a banker's, than that, in the former case, the acceptor undertakes to have the money to take up the bill at his house of business, in the latter, at his banker's. If presentment on the day of payment, or *place of payment, were conditions precedent, the holder, although prevented by causes which he could not control, must lose his debt, if the bill were not presented on the day of payment, for the condition could not be performed on any subsequent day; and he must be subjected to the same loss, if the banker fails, for not presenting it at the house of such banker, although the acceptor had made no provision for its payment. Such a rule must always work injustice, and, therefore, cannot be law. The acceptor, if he would avail himself of the non-presentment of the bill, must show by his plea that he was ready at the time and place of payment to take it up, but that the holder did not attend; and must bring the amount of the bill into court. On showing, that a tender of the amount of the bill was prevented by the default of the party to whom it should have been made, the want of tender will be excused. In all cases, a party is excused from doing what he otherwise ought to have done, by showing that the other party prevented him from doing it. Arbitrators sometimes direct money to be paid on a particular day at Lincoln's Inn hall; and rents, annuities, and other payments are agreed to be paid at certain specified times and places. In actions for the non-payment of the money in such cases, it is not usual to aver in the declaration, that the plaintiff attended at the appointed time and place in order to receive his money: and the early books of entries contain pleas, that the party to pay was at the place with his money, and that he who was to receive did not attend.

Upon the second question submitted to us by your lordships, I humbly submit, that such an acceptance is to be considered in law as a qualified acceptance, to pay the same at the house of Sir John Perring and Co., and not a general acceptance to pay the bill with an additional engagement or direction for the payment of the same at that house. I have stated the grounds on which I have formed this opinion, in my answer to your lordships' first question.

On your lordships' third question, I beg to say, that it seems to me to depend on the nature of the qualification in the acceptance, whether the taking it

without the previous authority or subsequent assent of A., would prevent C. from maintaining an action against A. A qualification which may prejudice the drawer, would discharge him, if taken without his assent—such as an acceptance postponing the payment *of the bill. An acceptance at a dif-

*188] ferent town from that in which the bill was drawn, might have the effect of postponing payment, and also of preventing so early a notice of non-payment as might have been received from the town in which the bill was drawn. Besides, no line can be drawn limiting the distance from the place to which the bill is addressed, at which it might be made payable by the acceptance, beyond the town in which it is drawn. A qualified acceptance, making the bill payable at another town, taken by the holder without the assent of the drawer, would discharge the drawer. But I can perceive no prejudice which can arise to the drawer from the holder taking an acceptance which changes the place of payment from the acceptor's counting-house, to the house of his banker in the same town. I believe that bills so accepted are more easily discounted than those which are accepted generally; and the greatest part of the bills of men in trade are now accepted payable at a banker's. Whoever draws a bill now, knows that, most probably, it will be so accepted. To allow a drawer or holder to make any objection on account of such an acceptance, would be to indulge their caprice, or give them a pretence for calling for their debts before such debts are fairly due. I have considered an acceptance payable at a banker's as merely changing the place of payment from the acceptor's counting-house to the banker's; and not as narrowing a right to demand the money any where, or to sue the acceptor without demand or notice; because I cannot conceive that any such right exists. Bills of exchange are often addressed to a man at a particular house, from which I infer that they are to be presented for payment at such house; and that there he is to prepare himself to pay them. If addressed to him in London, the meaning is, not that the bill may be presented any where in London; but it is presumed that the situation of the acceptor's counting-house is too well known to render it necessary that it should be mentioned in the address of the bill. There is a case in Lord RAYMOND, in which Lord HOLT is reported to have held, that, if a bill be accepted without mentioning the house at which it is to be paid, the holder is not obliged to receive it, *Mulford v. Walcot*, 1 Ld. Raym. 575; that learned judge could not have thought, that mentioning the house, narrowed the holder's right.

*189] "In answer to your lordships' fourth question, I have to submit that, if A., on receiving notice from C., that the bill was accepted with a qualification as to the time or place of payment, refuses his assent to such acceptance, C. may treat the bill as not accepted, and proceed on it against A., without delivering up the bill to A. If the drawer will not assent to the acceptance, which the person on whom he draws thinks proper to put to the bill, he cannot complain if proceeded against as the drawer of a bill, which the drawee has refused to accept. The bill is necessary to maintain the action against the drawer; and, therefore, the holder must be allowed to retain possession of it. A. having previously given such a bill for a debt due from A. to C., the latter is not obliged to declare on the bill, but, may bring his action for the original debt.

My lords, I hope that what I have humbly stated to your lordships as legal answers to the questions proposed to us, will be found to secure complete justice to all the parties to a bill, and to promote the convenience of those who are engaged in these negotiations. By allowing acceptances to be made payable at their bankers', merchants are relieved from the risk attendant on keeping large sums of money in their own houses. By holding that such an acceptance does not make presentment at the banker's a condition precedent, a just debt cannot be lost through accident or the negligence of clerks in not presenting the bill at the proper time and place; nor is a holder obliged to incur the expense and trouble of a presentment, when he is certain that no provision is made for pay-

ment: whilst, on the other hand, by allowing the acceptor to plead his readiness to pay, and bring the money into court, you prevent, by the penalty of costs vexatious arrests and unnecessary actions. By allowing holders and drawers of bills to object to acceptances which may prejudice their right, but preventing either from refusing an acceptance, which, though not strictly according to the tenor of the bill, cannot possibly affect their interest, the rights of parties are secured, whilst their caprice is made to give way to the convenience of others.

Your lordships have been repeatedly told by the counsel, both of the plaintiff and the defendant, of the inconvenience to commercial men which is likely to follow the establishment of what is contended for by the opposite party. There *never was a case more free from apprehensions of this kind. Mercantile [190] men only want certain rules upon these subjects. As soon as your lordships shall have declared what are the proper rules, all judges will act upon them, and all mercantile men will regulate their transactions according to them. If your lordships shall say that the acceptor may by his acceptance make his bill payable only at his banker's, but that the words used by this acceptor are not sufficient to express such a qualified acceptance, future acceptors will use terms which express this qualification of their contract more clearly. If drawers apprehend that such an acceptance is likely to occasion a return of their bills as being refused acceptance, they will guard against this by requesting, in the body of their bills, the drawee to accept them payable either at his counting-house or his banker's. Every holder will then know, that he holds them bills subject to their being accepted either generally or specially, and will, thus, be prevented from returning them for want of a sufficient acceptance.

RICHARDSON, J. (having stated the record and the four questions, and having informed their lordships that he should, with their leave, consider the first and second questions together.) This is the case of a bill of exchange, drawn by a person at Gosport, upon a person at Torpoint, requiring him, in general terms, to pay, at two months after date, a sum of money to the order of the drawer, which the drawee has accepted, payable at the house of trade of certain bankers in London. The question is, what effect does such an acceptance produce on the drawer, as to the conduct to be pursued by him before he sues, and as to the averments to be inserted in his declaration, when he sues upon the bill? It has not been, and, I think, cannot be denied, that the drawee of a bill of exchange is at liberty to qualify his acceptance, as by annexing a condition, or by enlarging or diminishing the time of payment; and, as he may enlarge or diminish the time, so he may, by his acceptance, fix the place of payment; and, in all such cases, I think it follows, that, as he is no otherwise party to the bill than by his acceptance, the holder is bound to sue him according to his acceptance; for the acceptance is the only evidence of contract as to him. The time or place of payment expressed in an acceptance is as much a part of the acceptor's *contract, as the like expression of time or place in the body of a promissory note is [191] part of the maker's contract: both, I think, are entitled to equal regard in ascertaining the rights of the parties. What then is the meaning of the terms of this acceptance, "Payable at Sir John Perring's and Co., bankers, London?" I think the meaning is the same, as if the acceptor had said, "I undertake to pay this bill at the house of Sir John Perring and Co. bankers, London." I think that it is not a general acceptance with an additional engagement or direction as to the place of payment superadded, but, that it is to be considered in law as an acceptance to a certain extent qualified; and, that the legal extent of this qualification is the same, as it is in other cases, where a man contracts to pay money at a particular place. It is material then to consider, what is the legal effect of a contract to pay money at a particular place? I apprehend it is this; that the debtor shall stand excused of damages and costs, if he is ready to pay the money at that place, according to his contract; but that the debt is not lost to the creditor by an omission on his part to demand it there, except, per-

haps, in cases where it can be shown that such omission has occasioned damage to the debtor. If so, it follows, that it is not necessary, on the part of the creditor suing for the debt, to aver in his declaration, that a demand was made at the place; but, that the defendant, by way of excuse against damages and costs, must show, that he was ready at the place to pay, but that no one was there on the part of the creditor to receive: and, for this purpose he must plead a special plea in the nature of a plea of tender, and must bring the money into court. Such, at least, is the general rule, namely, that the money must be brought into court: though I am not prepared to say, that an exception might not arise, if the defendant, in any particular case, could show, that the money had since been lost by the neglect of the creditor to receive it at the time and place appointed. This, I apprehend, is the law in the case of covenants, and of bonds, with or without penalty, for payment of money at a particular place; and of rent, where a particular place of payment is expressed in the reservation; or, where it is not so expressed; in which latter case, the law makes it payable upon the land. I will mention some instances. In an action of debt for 28*l.* Rast. 158 b, the declaration stated, that the defendant, by his bill obligatory, sealed with his seal, (*profert,*) at London, acknowledged himself to owe to the plaintiff 19*l.* 16*s.* of the money of Flanders, (parcel of the 28*l.*.) which 19*l.* 16*s.* were then and still are of the value of 14*l.* of English money, to be paid to plaintiff in the Cold Mart then next following. Then followed an averment, that the Cold Mart was a certain fair held at London, in the parish and ward aforesaid, from the 10th August, 1501, to the 20th September next following. The declaration then sets out another bill obligatory, for other 19*l.* 16*s.* Flemish, equal to 14*l.* English, to be paid at the Paske Mart, with similar averments; and concludes, "yet the said defendant, although often requested, the said 36*l.* 12*s.* of Flemish money, nor the said 28*l.* of English money, has not paid to the plaintiff, but to pay the same to him has hitherto refused, and still refuses." The defendant pleads, that the Cold Mart was a certain fair held at Bridges, in Flanders, in parts beyond the seas, without the realm of England, from a certain day to a certain other day, and that the 19*l.* 16*s.* were worth only 60*s.* of English money, and makes a similar averment as to the Paske Mart. He then avers, that he was at the said fairs, called the Cold Mart and the Paske Mart, ready to pay to the plaintiff 6*l.* of English money, if he, the plaintiff, had been there, and willing to deliver to the defendant the said bills; and that neither the plaintiff, nor any one for him, was then there to receive the said 6*l.*; and, that he has always since been ready to pay, and brings the same into court; and concludes with traversing, that the markets were held in London; and also traversing, that the 19*l.* 16*s.* Flemish, were worth 14*l.* English. The replication avers that 19*l.* 16*s.* Flemish were of the value of 14*l.* English; and concludes to the country. Whereupon a jury *de medietate lingue* is awarded. In an action of debt for rent, Rast. 175 a, by the abbot of the monastery of Holy Cross of W., the declaration shows a demise of a manor and lands for a year, rendering 40*l.* at W. aforesaid, at the four feasts of the year; that the defendant occupied for the year; and that the 40*l.* is still in arrear to plaintiff, *per quod actio accrevit*; and concludes, that defendant has not paid, although often requested. The defendant pleads certain acquittances as to part, and levy by distress for the residue. The plaintiff replies *non est factum*, as to the acquittances, and denies the levy by distress. In an action of debt, Rast. 322 b, against executors, the declaration states that the testator, by his bill obligatory, acknowledged to owe to plaintiff 17*l.* 10*s.*, to be paid in three half years, that is to say, 6*l.* 10*s.* at Storebrich fair next, and the rest at other fairs, averring when the fairs were held, and concluding, that testator and executor have not paid, although often requested. The defendant pleads *ne unques* executor. The plaintiff replies. The defendant rejoins. The plaintiff there had a verdict, and judgment. To an action

of debt for rent, Thompson's Entries, 159, pl. 167, et seq., the defendant pleads, that he, on the said day, &c., for the space of half an hour before sunset of the said day, was at the same common dining-hall of Thavies Inn, situate, &c., ready, and offered to pay the plaintiff the said 3*l.* rent, which he was bound to pay on that day, according to the form and effect of the said indenture; and that neither the plaintiff nor any one authorized by him, was then there to receive; that he has always since been ready to pay, and brings the money into court. The replication states, that the plaintiff receives the money, and for damages, protesting to the readiness and offer to pay, replies a subsequent demand and refusal, (not alleged to be at the place.) The rejoinder denies the demand. To an action of debt for rent, 2 Modus Intrandi, Pl. Gen. 234, the defendant pleads (after *oyer* of the writing) that he, on the day in the condition mentioned, for the space of an hour before sunset, and after, was at the said mansion-house in the said condition specified, ready to pay the said 40*l.*, according to the form and effect of the said condition; and that neither the plaintiff, nor any one lawfully authorized by him, was then there to receive; *semper paratus*, and *profert in curiam*. The plaintiff replies, that he was there to receive, and traverses that the defendant was there ready to pay. The defendant rejoins, whereupon issue is joined. In *Marshall v. Wisdale*, Freeman, 148, to an action for 10*l.* rent, the defendant pleads a tender of 9*l.*, and that he paid the *other 1*l.* for taxes. The plea was held bad, because he did not plead the tender at the place where the rent was agreed to be paid. The court said, it could not properly be paid any where else. In *Crouch v. Fastolfe*, Sir Tho. Ray, 418, to an action of debt for rent, the defendant pleads, that he was at the place on the day, from before sunrise to sunset, ready to pay, and that the plaintiff, nor any one in her behalf, &c., was there to receive; *semper paratus*, and *profert*. It was held a good plea, though no tender was alleged. These precedents and authorities, with many others which may be found in our old books of pleadings, and especially in cases of rent, which the law makes payable upon the land, seem to me to be strong evidence of what the law is in cases of contract to pay money at a particular place; and to establish two propositions which may be considered as general rules, though, like other general rules, subject perhaps to exceptions under special circumstances. First, that a demand at the place is not a condition precedent to the creditor's right to sue for the money, nor, of course, necessary to be averred in his declaration. Secondly, that the defendant may excuse himself, by pleading that he was ready to pay the money at the place appointed; but that, in such plea he must show that he has always since been ready, and must bring the money into court. The same law appears to me to be applicable to the acceptances of bills of exchange such as this acceptance is, which I consider to be a contract by the acceptor to pay the money at the place by him expressed. I am aware that this opinion is inconsistent, not only with the cases of *Callaghan v. Aylett*, 3 Taunt. 397, and *Gammon v. Schmoll*, 5 Taunt. 344; but also with the opinions expressed by the Court of King's Bench in *Saunderson v. Bowes*, 14 East, 500, and acted upon by the same court in *Dickinson v. Bowes*, 16 East, 110; and also acted upon by the Court of Exchequer Chamber in *Bowes v. Howe* in error, 5 Taunt. 30. The two first mentioned cases, were cases of bills of exchange accepted, payable at a particular place; the three latter were cases of promissory notes, expressed in the body of *them to be payable at a particular place; and, in all of them, a demand at that place was considered as a condition precedent to the holder's right to sue upon them. I have felt the weight of these authorities, and it has not been without much consideration that I have felt myself at liberty now to dissent from them. But, considering that the general question, upon which so much difference of opinion has prevailed, is now before this court of ultimate resort for a final decision, which must operate as a general rule in all future cases, it is very important,

tant, that that rule should be founded on true principles, and, as far as is consistent with such principles, that it may be practically convenient. For this reason I have ventured to inquire into the grounds of these decisions. In the cases which occurred in the Common Pleas, I do not find that the point on which my opinion is founded, (namely, that where money is to be paid, at a specified place, it is matter of defence, and, that it is therefore incumbent on the defendant, to show that he was ready at the place to pay,) was fully brought before the consideration of the Court: no authorities, at least, appear to have been cited in support of it. In the case of *Saunderson v. Bowes*, in the King's Bench, which was followed by the cases of *Dickinson v. Bowes*, and *Bowes v. Howe*, with deference, I think, that the court fell into a mistake in supposing, as they seem to have done, that the rule requiring the defendant to show, by way of excuse, that he was ready with his money at the place appointed for payment, (which rule they admitted in the case of bond under penalty,) was confined to such cases where a penalty was to be excused, and where the defendant was called upon to plead the condition, of which he wished to avail himself. I humbly apprehend that there is no such distinction; and that I have shown by the precedents and authorities before cited, that the same rule equally applies to the cases of single bills, without penalty; and indeed, as I conceive, to all cases where the contract is to pay money at a particular place. It may be suggested, that, if the doctrine, which I have ventured to express, be applicable to the acceptance of bills of exchange, it is extraordinary that no case has occurred, or, at least, that none has been cited, where such a plea has been pleaded by an acceptor. To this I should answer, that probably no case [196] has occurred where an acceptor has been sued without a *previous demand of the money, or, without such circumstances existing as evinced that he was not ready to pay. And this leads me to remark, (though I am aware, that convenience alone is not a legitimate ground of decision, unless it be consistent with law,) that to require the defendant to aver and prove readiness to pay in the few, if any, cases, where, notwithstanding his readiness, he may be vexatiously sued, rather than to require the plaintiff, in all cases, to aver and prove an unavailing demand, will, as I humbly conceive, be a more convenient, as well as a more just rule for both parties, and more merciful to defendants themselves. For if, as the fact is, in almost every case of an action brought against the acceptor of a bill, the defendant has failed to pay from mere inability; to require proof of the previous demand, will only add the expense of one more witness, sometimes brought from a distant part of the kingdom, to the burden, which the defendant was before unable to bear: whereas, on the other hand, if an action, without previous demand, should ever vexatiously be brought against an acceptor, who was really ready with his money at the place appointed according to his contract, he, by pleading his readiness, and bringing his money into court, may discharge himself from damages and costs, and the plaintiff will justly be punished for his vexation by the payment of costs.

I have one other observation only to make on this part of the case. It may be said, that unless the holder be bound to demand payment at the place appointed, he may demand it at some other place, where the acceptor is not prepared with funds. I answer, that, if such a case should occur, I think the acceptor would be entitled to a reasonable time to draw his funds to that place. For this, the case of *Halsted v. Vauleyden*, 1 Rol. Ab. 443, pl. 5, 20, is an authority, where (the defendant having by deed acknowledged that he owed to the plaintiff 111*l.*, and covenanted that the same should be paid by C. at Rotterdam, in Holland, on the first demand that should be made,) it was held, on a special verdict, that the plaintiff might make his demand at Dort, which is ten miles from Rotterdam, or in England; but, that in such case, the defendant ought to have a reasonable time to pay, regard being had to the distance.

*In answering the third question proposed by your lordships, I think it necessary to distinguish between a qualification as to time, and a qualification as to place ; any qualification as to time, whether the time of payment be thereby accelerated or retarded, which the holder permits to be introduced into an acceptance without the concurrence of the drawer, must, I think, have the effect of discharging the drawer. I think it must have such effect, because it necessarily varies, and must be intended to prejudice his situation, as to the time when he may be called upon to pay on the acceptor's default, and as to the time when he must resort to his remedy over against the acceptor. As to place, I think it is not every qualification of place which may be introduced into an acceptance, without the privity of the drawer, that will necessarily discharge the drawer ; but to produce that effect, I think the qualification must be such as must vary, and may be intended to prejudice his situation. For instance, if a bill drawn upon a person in the Temple, be by him accepted, payable at the banking house of Messrs. Child and Co., at Temple-bar, this, I think, would not have the effect of discharging the drawer. But, if such bill were accepted, payable at Dublin or Amsterdam, this, if taken without the privity of the drawer, would I think, discharge him ; because it would necessarily vary, and might reasonably be intended to prejudice his situation, as to the time when he could receive notice of the acceptor's default, and as to his remedy over against the acceptor. It may be difficult to lay down prospectively a precise rule, applicable to all cases, for defining the degree of distance from the residence of the drawer, at which he may be permitted by the holder to appoint, by his acceptance, the place of payment, without discharging the drawer. I should say, that to produce that effect, the distance must be such, as would probably delay the drawer in his receipt of notice of the acceptor's default of payment, or throw some increased difficulty upon him in his remedy over against the acceptor.

In answer to the fourth question proposed by your lordships, I think, that in the case put, C. might maintain an action against A., upon the original debt, without first returning to A. the bill drawn by him, C. having first cancelled the qualified acceptance offered by B., to which A. is supposed to have refused his consent. Such an acceptance, so *offered by the drawee, but refused by the payee, because the drawer refuses his consent, is to be considered as no acceptance at all ; the bill becomes a dishonoured bill, and consequently the payee has an immediate remedy against the drawer, either upon the bill, or upon the original debt.

GARROW, B., concurred entirely with BEST, J., and RICHARDSON, J., both in their opinions, and the reasons given by them for those opinions ; and referred to them as containing his own views of the case ; observing only, in addition, that it was well known in the mercantile world, that the Governor and Company of the Bank of England had determined to discount no bills which were not accepted, payable at a banker's.

BURROUGH, J. In answer to the first question proposed by your lordships, I submit, that the usage and custom of merchants does not require, that the drawee shall accept a bill of exchange in any given form. He may accept it by parol, or in writing. He may accept it generally ; and, if he does so, he is, in the language of some of the cases, generally and universally liable : Or, he may accept it specially ; and, then, he is liable according to the tenor of the bill and his acceptance thereof. Whatever the acceptance may be, if an action be brought against the acceptor, the declaration must truly state the acceptance ; for, the acceptance contains the terms, on which he has agreed to the bill. I am of opinion, that the acceptance is a contract which must be construed, as all other contracts are, according to the intention of the party contracting, to be collected from the nature and words of the contract itself. The acceptance, if special, binds him *sub modo*, and not generally. There is neither hardship or illegality

in this. In the present case, the intention appears to me to have been to do away with the necessity and trouble of a personal application to him, upon the bill becoming due, and of his keeping money by him to pay it, but to substitute a much more convenient course in the first instance. No holder of a bill, when he goes to the banker's shop, expects to find the acceptor behind the counter: on the contrary, he knows he shall not find him there. On the face of this count, the bill is alleged to have been accepted according to the usage and custom of merchants: yet the doctrine^{*} of the case of *Smith v. De la Fontaine*, and other subsequent cases^{*199]} is, that the acceptor, notwithstanding a special acceptance, is generally and universally liable. This is a doctrine to which I cannot subscribe. The effect of such doctrine is, that notwithstanding a well known place is pointed out where the money may be obtained, the holder shall be at liberty to arrest the acceptor the moment the bill becomes due, and to turn a special and qualified undertaking into a general one, having very different consequences. It seems, however, to be now conceded, that this doctrine cannot be supported. But, then, it is said, that this special qualified acceptance makes no difference as to the averments in the declaration, except as to the statement of the acceptance. As I understand the acceptance stated in this declaration, I am of opinion, first, that it imports that there is a fund in the hands of the banker to answer the amount of the bill; and, secondly, I say, that this acceptance means to impose and does impose on the holder an act to be done by him, namely, to present the bill at the bankers for payment: If payment is not made on application, the acceptor's contract is broken, and not till then. But the holder must state in his declaration the title to his action, which is, that the bill was presented and not paid, and so his cause of action has arisen against the acceptor.

The case of *Bishop v. Chitty*, Str. 1195, in no way assists the case of the defendant in error. The underwriting of the order for the payment of the money in that case, I admit, amounted to an acceptance, and it was, indeed, declared on as such: the possession of the bill with the order for payment of it were, in my judgment, sufficient to throw on the plaintiff the burden of proof, that he had presented the order, and could not obtain payment of it. It was there helden by Lord Chief Justice Lee, to be the plaintiff's loss; for, he said, it was to all purposes a draft, which is always considered as actual payment when a reasonable time to receive it has elapsed. *Smith v. Abbott*, Str. 1152, is an instance of a conditional or contingent acceptance, and in which it was incumbent on the plaintiff to state in his declaration, and to prove at the trial, that ^{*200]} the contingency "had happened. The acceptance was "to pay when goods consigned to him," (and for which the bill was drawn) "were sold." The court held, that the acceptance was within the custom of merchants; and said, that the plaintiff might have refused it. The court said also, "it will affect trade, if factors are not allowed to use this caution, when bills are drawn before they have an opportunity to dispose of the goods. A man, who is drawn upon at ten days' sight, may accept for thirty, though the other might protest the bill." So, in this case, I say, it will affect trade, if a man is, at all events, contrary to his intention, to be deemed to have accepted generally: or, if his acceptance in this form is to be so construed, as to make him liable to be held to bail as soon as the bill becomes due. The fallacy, in this case, seems to me to consist in supposing, that the acceptor has engaged for a personal payment at the bankers. This appears to me to be contrary to the intention and the effect of the acceptance, to be collected from the words of it. Suppose the acceptance to have been in this form. "Accepted to be paid by me, if, on application to Messrs. Perring and Co., my bankers, when the bill becomes due, it shall not be paid by them;" there is nothing in the usage and custom of merchants to show, that such an acceptance would not have been good. But, whether an acceptance be good or bad within the custom, if the party, who leaves the bill for

acceptance, receives it back without objection, he must abide by it. If he cannot recover according to the custom, it is his own fault. The acceptor can only be liable to an endorsee on an acceptance within the custom. In my judgment, the acceptance in the case before the house is in effect such as I have supposed; that this was the intention of the party, I think there can be no doubt; the words of the acceptance appear to me to manifest it. In *Julian v. Shobrooke*, 2 Wils. 9, the defendant had accepted a bill on account of the ship *Thetis*, when in cash for the ship's cargo. It appears in the report of that case, that the acceptance was so stated in the declaration, and that the plaintiffs averred in his declaration (as I think he was obliged to do) that, on the day when the bill became payable, the defendant was in cash for the said ship's cargo. This the plaintiff must have been bound to prove at the trial; because it was part of his case, and it consisted of matter in the affirmative. In the present case, the defendant in error must contend, that, if the cause had gone to trial on proof of the acceptance, he would have established a *prima facie* case; for he might have urged on the plea of *non assumpsit*, that the objection (if any) was on the record. As this record is, the question arises on a special demurrer. I am of opinion, however, that the declaration is substantially defective. First, because a material averment is omitted, namely, the presentment of the bill for payment at the bankers, Sir John Perring and Co., which is matter in the affirmative, and, I think, that it lay on the plaintiff to aver it. Secondly, because the cases referred to in support of the assertion, that the answer was to come on the part of the defendant below, do not support that assertion. The cases supposed were covenant to pay money at a certain place on a certain day: (*ex. gr.*) to pay to the plaintiff in an action of covenant 100*l.* on the 1st of August, at or in the common dining-hall of Lincoln's Inn. It is said, that, in a declaration on such a covenant, the plaintiff's breach is good, "that the defendant did not pay the money on the day at or in the common dining-hall aforesaid, but neglected and refused so to do." I admit that this is so, but it is so, because the defendant covenants to do the act personally to the plaintiff at that place; and the breach is, that he did not do it at the day and place, but neglected and refused so to do. This is good in a declaration, which is to be certain to a certain intent in general; and it implies, that the plaintiff was there ready to receive,—the parties having agreed to time and place. If this acceptance had amounted to an engagement by the acceptor to pay personally at Sir John Perring's and Co., the case alluded to might have had some weight. But this acceptance is not so, nor, from the language of it, can it be taken to be so meant; but, as appears to me, the contrary was intended, viz: that Sir John Perring and Co., the bankers, were, in the first instance, to be looked to for the money; and that the acceptor was to be resorted to in case of non-payment by them.

I will now, shortly, advert to the cases more immediately applicable to the subject; and the weight of those cases appears to me to be in favour of the plaintiff in error. The first case, to which I have occasion to refer, is *Smith v. De la Fontaine*, Holt, N. P. C. 366, note. In that case, Lord MANSFIELD is reported to have held, that the words accompanying an acceptance "payable at a particular place," or the words "payable at," &c., were not words restricting or qualifying the acceptor's liability; but rendering him generally and universally liable: and, that it was not necessary to prove a demand at the particular place in an action against such acceptor. If this was meant of an acceptance, by which the acceptor personally engaged to pay at a particular place, I should feel no objection to the observation: but, if it was meant to apply to cases wherein the acceptance has no such import, I do not think it law. The next case was that of *Saunderson v. Judge*, 2 H. Bl. 509, which does not affect the question in this cause. There the promissory note was in the ordinary form. It was made by one Sharp, and payable to Wilkinson or

order. At the foot of the note there was a memorandum, that he would pay it at the house of Saunderson and Co. The court held that this memorandum was no part of the note. If it was no part of the note, the holder, who was endorsee, was not privy to it: it did not bind him, because it was not transferred to him by the endorsement of the note. In *Parker v. Gordon*, 7 East, 385, the bill of exchange was accepted as in the present case; and, there, the Court of King's Bench, consisting of Lord ELLENBOROUGH, Justices GROSE, LAWRENCE, and LE BLANC, (Lord ELLENBOROUGH having nonsuited the plaintiff) on motion to set aside the nonsuit, held that the plaintiff, the holder, was bound to present it at the bankers within banking hours. They must have considered it as part of the acceptance. If it was no part of the acceptor's contract, the holder could not have been bound so to present it; but, on the contrary, he should have applied to the acceptor himself for the money. The next case in order of time is *Lyon v. Sundius and Sheriff*, 1 Campb. 423. The acceptance was of a bill of exchange, as here; Lord ELLENBOROUGH, in that case, appears to me to use expressions not warranted by law. He says, "How can you make three words—at Hankey and Co.'s—more than a memorandum?" The answer

*appears to me to be, that they are more, for they are part of the acceptance.

*203] His lordship then says, "the acceptor of a bill of exchange is liable universally;" the observation on this is, that he is so, if he accept generally, but not otherwise; for his obligation and the extent of it must depend on the acceptance itself. His lordship then proceeds to say, "this very point was brought before the court some time ago, when the judges were all of opinion, that such words form no part of the contract, and did not require to be set out in the declaration." If I thought this to have been an opinion deliberately formed by that excellent and able man, I should have hesitated before I declared myself persuaded, that it is not tenable. It appears to me, that it cannot now be contended that such words are no part of the contract of the acceptor. When his lordship says, "this point was brought before the court some time ago," I presume, he means to refer to the case of *Smith v. De la Fontaine*, in Lord MANSFIELD's time. That case was probably introductory of the confusion which has existed on this subject. The next case is *Ambrose v. Hopwood*, 2 Taunt. 61, where the Court of Common Pleas held, that, in an action on an acceptance, like that in the present case, the declaration must aver, that it was presented at the place where the person, by whom it was made payable, resided. In a subsequent case, *Huffman v. Ellis*, 3 Taunt. 415, in this house, it was holden to be sufficient to allege the bill to have been presented to the persons themselves. Still the case of *Ambrose v. Hopwood* shows it to have been the opinion of the Court of Common Pleas, that the declaration must aver a presentment consonant to the acceptance; and the acceptance throughout is treated as a substantial part of the contract. In *Callaghan v. Aylett*, 3 Taunt. 397, the acceptance was nearly like the acceptance in this case. The bill was there accepted payable at Messrs. Ramsbottom's, bankers, London. The declaration alleged an acceptance generally. At the trial it was objected, that this was at variance; and, that there was no proof of a presentment at the place. A verdict was taken for the plaintiff, and these points were reserved for the opinion of the court.

*204] On argument, the Court of Common Pleas held, that this *was a qualified acceptance, to which the holder (he having acquiesced in it) was obliged to conform, and directed a nonsuit. Then follows in order of time the case of *Fenton v. Goudry*, 13 East, 459. In that case the acceptance was in this form, "payable at C. Sikes, Snaith, and Co." And the bill was addressed to the defendant at "No. 54, Lower Shadwell, Wapping." It seems, that, in this case, the idea of the expansion of the promise to pay first arose. One would think, there had been a precedent independent general engagement, and that something expansive was added to it. The acceptance is one act: to call it an expansion of the promise, is, in substance, to make it a general engage-

ment, and pleadable as such. It is the promise itself. It is one entire engagement; and the legal effect of it is, "I accept or agree to this bill, but you must go first to Sikes, Snaith, and Co. for the money." This makes it a qualified or conditional engagement. In that case a learned person, who argued for the defendant, says, "where something is to be done by both parties at the same time, the defendant, who is sued for a breach of his part of the engagement, must show, that he did all that lay upon him to do, and that the plaintiff did not perform his part, which prevented the defendant's performance," 13 East, 465. I conceive, the facts of that case do not warrant this observation; for the presentment is solely the act of the holder; and the payment is not to be made by the party himself, for no one expects to find the acceptor behind the banker's counter: therefore, there is nothing to be done by both parties at the same time; for the parties, from the nature of the engagement, are not to be present at the same time. This is an argument, which probably had much weight; but I conceive, that the foundation of it fails. In deciding the case, the lord chief justice appears to have said, 13 East, 469—"It has become a frequent practice, in order to avoid the inconvenience to the holder of not having his bill honoured, when he calls for payment at the party's ordinary place of residence, to intimate his other house of residence for the purpose, if I may so express it, which is at his banker's, where he engages, as it were, to be found at the usual hours of business." I am *satisfied, that this observation is ill-founded. No one believes it to be the acceptor's place of residence, nor, that he will be at all found there. The truth is, it is to avoid the inconvenience of keeping funds in his own house, that he makes the bill, by his acceptance, payable by, or at his banker's, which is not his house of residence, nor considered as such; but, where he has cash or credit. It cannot but be observed too, that there was floating in his lordship's mind, that the obligation to pay by the acceptor was general and universal; this is true of a general acceptance; but if it be urged as applicable to a special, qualified, or conditional acceptance, I cannot agree to it: for, though the party, who calls for the acceptance, may refuse to take it, if it be not general; yet, if he do accept it, and assent to its being special, he must pursue his remedy according to the terms of the contract itself: for, an acceptance is as much a contract, as is a policy of assurance or a charter party. Both the other learned judges, in that case, appear to speak with considerable doubt on the subject; the court hinted at a further consideration of the question, for judgment *nisi* only was given; but, as the reporter says, no further notice was taken of it. After this case, in *Gammon v. Schmoll*, 5 Taunt. 344, S. C. 1 Marsh. 80, the Court of Common Pleas gave judgment on a question precisely similar to the present, on a full consideration of *Fenton v. Goudry*, and all the preceding decisions. That court held, first, That the acceptance was a contract. Secondly, That the introduction in it of the words "Payable at Batson's, London," qualified the contract; and, that it was a condition precedent. Thirdly. That the holder must show in pleading, that he has complied with it. One of the learned judges, CHAMBRE, J., who concurred in this opinion, observed, that the reasons given in *Fenton v. Goudry* show, that the judges were very doubtful as to this point. The case of *Huffam v. Ellis* (which I have before alluded to) came before this house on error. The bill was accepted, payable at Kensington, Styans, and Adams'; and, it was averred in a declaration by an endorsee against the drawer, that the bill was presented to the house using the name, style, and firm of Kensington, Styans, and Adams. This house held, that this was a sufficient averment to satisfy *the words, "payable at Kensington, Styans, and Adams." The case of *Bowes v. Howe*, 5 Taunt. 30, is a case of great weight. It was subsequent to all the cases on this subject, which have been brought before the courts, except *Gammon v. Schmoll*; and that was in the following year. *Bowes v. Howe* was an action by one, who held a pro-missory note by assignment or endorsement against the makers. The note was

made payable at Workington Bank. The declaration averred, that the plaintiffs in error (the makers of the note) became insolvent before the action, and wholly declined and refused to pay it at Workington Bank. The plaintiff below had judgment, which was reversed in the Exchequer Chamber. The lord chief baron, Sir ARCHIBALD MACDONALD, delivered the judgment of the court. He held that the question was, whether the allegation in the declaration dispensed with the necessity of presenting the notes (for there were counts on many other notes) at Workington Bank? And, that it was clear that a demand was necessary unless dispensed with; and that the allegation was not sufficient to enable the plaintiff below to maintain his action. The words at "Workington Bank," were in the body of the note; the words "Payable at Sir John Perring's and Co." are, in the case before this house, in the body of the acceptance; and, I am of opinion, that there is no solid distinction between that which is incorporated in a note, and that which is incorporated in an acceptance. It is proper to advert to the case of *Head v. Sewell*, Holt N. P. C. 363, which arose before Lord Chief Justice GIBBS at *nisi prius*. He held, in the case of such an acceptance as the present, that it was not necessary to prove a presentment at the place mentioned in the acceptance; and, following up the language of some of the cases, said, that the acceptor is generally and universally liable. It seems to me to be most strange, after the cases in his own court, (one of which was not more than two years before) which were directly contrary to this opinion, that nothing further should have been done in this case of *Head v. Sewell*; that it should not have been brought before the court. I am persuaded, that there must have been some circumstances in that case, which the reporter has not noticed. The case of *Richards v. Lord Milsington*, Id. 364, note, need only be mentioned shortly. That was "an action on a promissory note, before the same chief justice at *nisi prius*. His lordship said, "the words 'payable at Bruce and Co.'s' are not introduced in the body of the note, they are only inserted in the margin." This case, therefore, has nothing to do with the subject. I have adverted to all the cases which appear to be applicable to the case before the house; and the result is, that I am of opinion, that the bill of exchange in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir John Perring's and Co., bankers, London, the holder was bound to present it at that house, and to aver in his declaration that the same was presented at that house for payment.

As to the second question proposed by your lordships, it is not necessary to say more in answer to it, than that I am of opinion, that the acceptance is, in law, to be considered a qualified acceptance, that the bill shall be paid at the house of Sir John Perring and Co., bankers, London, and not as a general acceptance to pay the same, with an additional engagement or direction for the payment at that house. The acceptance is an entire contract; the holder who receives it, must take it as it is, (if he does not dissent from it,) and it must be construed as it was meant, if the intention can be discovered, and the words are sufficient to effectuate it. I feel no doubt as to the intention, and can discover no legal ground to prevent its being carried into effect.

As to the third question proposed by your lordships, I am of opinion that this must be considered, first, as to the time, secondly, as to the place. And first, as to the time; if B. accept a bill drawn on him at 3 months, and, by his acceptance, make it payable at 4 months, and thereby lengthen the time of payment, I think C. could not maintain an action against A., if this be done without his previous authority, or subsequent assent. And, if it was accepted payable at a shorter time than 3 months, without such authority or assent, I think the law is the same; because, the drawer might be liable to be called on sooner for the money than by the terms of his bill he had a right to expect. Secondly, as to the place; the question, as it appears to me, is, whether the

variation is material? A general acceptance would have an implied relation to the drawer's place of abode. If the *drawee accept it payable at his banker's in the same place, I am of opinion, that would not be material, [*208 and, that a drawee may, within the custom of merchants, well appoint another place of payment, if no material inconvenience to the holder, be thereby introduced.

In answer to the fourth question proposed by your lordships, I am of opinion, that, in the case comprehended in this question, C. the payee, could not maintain an action against A. the drawer, without delivering, or offering to deliver up, the bill to him: for, whilst the bill remains in C.'s hands, the drawer's remedy is suspended; and, when the drawer has the bill returned, it will appear that the drawee has not complied with the requisition in it, and the drawer is restored to his original situation. I do not think, that the debt owing from B. to A. in any way varies the case, as between A. and C.; for, C. receives the bill from A.; and, until C. has agreed to an acceptance materially different from the terms required by the bill, the transaction rests between A. the drawer, and C. the drawee.

HOLROYD, J. As to the first question proposed by your lordships, I am of opinion, that, in this case, the bill of exchange mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir John Perring's and Co., bankers, London, (that is to say, at the house of certain persons using in trade and commerce the names, style, and firm of Sir John Perring and Co., bankers, London,) the holder was not bound to present it at that house for payment, and to aver in the declaration that the same was presented at that house for payment.

As, in my way of considering the subject, the second question appears to me to be involved in the first, I shall state my opinions on the second question, before I give to your lordships my reasons for either.

On the second question, I am of opinion, that the said bill, having been so accepted as aforesaid, such acceptance is in law to be considered not as a qualified acceptance, to pay the same at the said house of Sir John Perring and Co. bankers, London; but, as a general acceptance to pay the same, with an additional engagement or direction for the *payment thereof at that [*209 house. Though the allegation in the declaration has not treated the acceptance simply as a general acceptance, but has stated the place of payment as a part of it; yet, as the allegation is, that the defendant accepted the bill *according to the usage and custom of merchants*, payable at Sir John Perring and Co., bankers, London, the first question appears to me to involve in it that which is proposed to us as the second question, namely, what is the effect of such acceptance *according to the usage and custom of merchants?* in like manner, as if the allegation had been simply that of a general acceptance, and, as if the question had arisen at the trial on the proof of an acceptance made payable at the place.

In considering the first question, therefore, which will also dispose of the second, I shall, in the first place, consider, what is in law to be now deemed the effect of this acceptance, according to the usage and custom of merchants. If it be in law to be considered not as a qualified, but as a general acceptance *according to the usage and custom of merchants*, with an additional engagement or direction for payment at the specified house, it will stand, then, in my opinion, as if a mere general acceptance were stated in the declaration; and, in an action against the acceptor upon a mere general acceptance, although he may be ignorant in whose hands the bill is, and, consequently, know not to whom to go to pay it, yet the constant course of proceeding in such action has always been not to allege a presentment to the acceptor for payment, nor to prove it at the trial.

The history of the cases before that of *Callaghan v. Aylett*, and the grounds upon which those cases, as well as the case of *Fenton v. Goundry*, were decided, appear to me decisive upon the two questions. The doubts, which have arisen upon the effect of these acceptances, appear not to have been entertained, until after that point had been decided as a point free from doubt, both by judges and jury, for a period of nearly twenty-six years; those decisions taking as their basis the generally received and known usage amongst merchants, as to the effect of these acceptances, both previous, and up to, and during all that period of time. The case of *Smith v. De la Fontaine*, according to the note which *I have of the case, was decided in the year 1785,

*210] first upon a trial by jury before Lord MANSFIELD, (to whom, Lord ELLENBOROUGH says, in *Fenton, v. Goundry*, the law of bills of exchange was as familiar as to any judge who ever sat on the bench,) and, afterwards, by the whole Court of King's Bench, who were so clearly of opinion, that the making of the acceptance to be payable at Messrs. Biddulph, Cox, and Co.'s, was for the convenience of the acceptor; and, that there was no colour for the objection, that it was a special acceptance, and that the plaintiff ought to have proved an application at that house for payment in that action, which was as an action against the acceptor; that the court refused even a rule *nisi* to set aside the verdict for the plaintiff and enter a nonsuit. This continued to be acted upon as the law, from thence till the year 1808, when the same point was determined by Lord ELLENBOROUGH in *Lyon v. Sundius*, which was a similar action on a like acceptance; Lord ELLENBOROUGH, considering the point as settled and without doubt, and that the additional words were nothing more than a mere memorandum, the acceptor being liable universally: and so this continued, with the exception of *Callaghan v. Aylett*, which I shall notice presently, till *Fenton v. Goundry*, in Easter term, 1811, when, on a demurrer to a count like the present, the Court of King's Bench decided, that the acceptance was to be considered in law as a general acceptance with a mere intimation for convenience of the place designed for payment. Lord ELLENBOROUGH proceeds to decide the case upon the generally received opinion of the commercial world, as a matter quite clear of doubt, and upon what he had always understood to be the practice and doctrine concerning bills of exchange, since he had been familiar with them. The other judges of the court, with the exception of Mr. Justice LE BLANC, who was absent from indisposition, also coincided with Lord ELLENBOROUGH in deciding upon the generally received opinion and practice which had long before prevailed. When the usage and custom of merchants respecting bills of exchange has been inquired into and ascertained, such usage and custom becomes matter of law, to be taken notice of as such by the judges; which is the reason why, though such usage and *211] custom used formerly to be alleged in *pleading as a fact, such allegation has for a long time been wholly discontinued.

Two cases, besides that of *Callaghan v. Aylett*, had indeed intervened, but they were both of them against the drawer, and appear to me to be not material to the present questions. One of them, *Parker v. Gordon*, 7 East, 385, is in the King's Bench; the other, *Ambrose v. Hopwood* 2 Taunt. 61, is in the common Pleas. The acceptances were similar to the present: the one was a determination, that, *in order to charge the drawer*, a presentment at the place out of the usual banking-house hours was insufficient: and the other, that a presentment to the bankers, without saying at that place, was insufficient for that purpose and, in neither case, did there appear to have been any presentment to the acceptor himself, personally, at all.

The case above referred to, of *Callaghan v. Aylett*, 2 Campb. 549, S. C. 3 Taunt. 397, was a case which was decided by the Court of Common Pleas, (MANSFIELD, C. J., being absent,) Hilary term, 1811, so lately as the very term next before the decision in *Fenton v. Goundry*; but the cause had been tried

before him, and a verdict had been given for the plaintiff, subject to the opinion of the court as to the necessity of proving that the bill had been presented at the bankers for payment. As far as can be collected from both the reports of that case, the court do not, on that occasion, appear to have had the case of *Smith v. De la Fontaine* laid before them; or to have considered, whether there was any known, established, declared, or generally received understanding or usage upon the subject amongst merchants. But they appear to have decided in that case, entirely upon the dry construction and effect of the acceptance, as a mere engagement to pay the bill at a particular house, named by the acceptor; treating it as a mere naked question of construction, arising from the words, independently of any inquiry as to the usage and custom of merchants respecting it. The case of *Gammon v. Schmoll* has, indeed, been since decided by the Court of Common Pleas, (MANSFIELD, C. J., being, then also, absent,) in which that court appear to have decided again, "upon the mere construction [212 of the words alone, that the acceptance contained a condition precedent.

In now considering the question, whether the acceptance in the present case be a general or a qualified acceptance, it appears to me, that, upon a question of this nature, it is an important inquiry and consideration, whether there was any, and what generally received, declared, or known usage and custom amongst merchants; more especially, if any such had been ratified and confirmed in judicature by judges and jurors; and that alone appears to me to be in itself decisive of the question, both upon the law and justice of the case. The parties thereto must, I think, be taken, in an instrument of a peculiarly commercial nature, both to have given and received this acceptance, (and consequently to have meant and understood it,) according to such generally received, known, and declared understanding, and usage, and custom. After the decision of *Smith v. De la Fontaine*, both by the jury and the court, especially when confirmed afterwards by *Lyon v. Sundius*, in the year 1808, it must, I think, be deemed, that there had been, upon the subject, both before and up to, and during that period, and until the determination in *Callaghan v. Aylett*, a generally received and known opinion, and usage, and custom among merchants, by which those acceptances were meant and taken as general acceptances, with a mere intimation of a place for payment; and not as qualified acceptances, which might be refused: an opinion, usage, and custom ratified and confirmed by those judicial determinations; and continually acted upon both before and during that period, by the constant reception of all such acceptances, without any instance being brought forward of the refusal of any, as being a qualified acceptance. In a question, therefore, as to the effect of such an acceptance, (which is, really, only a question, what the parties meant and understood by the acceptance, which the one had given and the other had received,) it must, as it appears to me, be taken, that the one of them meant, and that the other understood him to mean, by the acceptance so given and received, nothing but what was the generally received understanding upon the subject, of persons most generally giving and receiving such mercantile instruments, namely, merchants; especially when that had been inquired into, "ascertained, determined, declared, and confirmed by judicial decisions. [213

But, even if this supposed generally received understanding, usage, and custom, is to be considered as unascertained and uncertain, and that the effect of this acceptance is, for its construction, to be taken from itself alone; still I cannot but think, that it is to be deemed only as a general acceptance to pay, with an additional engagement or direction for the payment at the specified house. In this view of the question, the legal principles and rules of construction, as well as the nature of an acceptance in itself, appear to me to be most material to be attended to.

Let us consider the nature of an acceptance in itself. The bill is brought merely for acceptance, that is to say, for a declared assent, that the acceptor

will pay it according to the usage and custom of merchants. A mere declared assent by the drawee to pay, or any thing amounting thereto, is, in law, an acceptance. By the first word, "accepted," which is the thing, which the very bringing of the bill requires the drawee to do, and which the drawer has a right to expect that the drawee will do, if he has the effects in hand, which his acceptance of the bill implies:—I say, by the very first word, "accepted," the drawee has declared his assent to pay the bill; and, as I think, to pay it in such manner as the drawer has required, unless that which is added so qualifies this assent, as to be inconsistent with an assent to pay it as required. If it be not thus inconsistent upon the face of it, the holder is not to suppose, that it was meant to do away or alter the effect of what the acceptor had before written and signified; and, if the acceptor did so mean, he should have so expressed himself, or should have stated, that he would not accept the bill as required, (that is, to pay it according to the usage and custom of merchants,) but that, though he would not so accept it, he would engage to pay it at such a particular place, if the holder would take that engagement.

The words of the acceptance are those of the drawee only, and not of the drawer or of the holder, and are to be taken, although according to the intent, yet where that is not sufficiently ascertained, most strongly against the person using those words. The maxim of law, *verba fortius accipiuntur contra proposcendentem*; and Lord Bacon's observations *thereon, appear to me very applicable to this case, supposing this is to be considered as a mere question of construction. He says that this rule "is author of much quiet and certainty, and that in two sorts; first, because it favoureth acts and conveyances executed, taking them still beneficially for the grantees and possessors; and, secondly, because it makes an end of many questions and doubts about the construction of words; for, if the labour were only to pick out the intention of the parties, every judge would have a several sense; whereas this rule doth give them a sway to take the law *more certainly* one way," Reg. 3. This rule, I think, requires the drawee, especially where it is to defeat in any degree the rightful expectations of the drawer, that the bill shall be unqualifiedly accepted as he has drawn it; and where the drawee has, in the first instance, declared his assent to pay it, if he meant to qualify or do it away, or alter it in the whole, or in part, or to clog that which is yet absolute, with any condition not beneficial either to the drawer or to the bill-holder, this rule, in my opinion, requires the drawee, in such case, to use, in addition, such words as clearly and unequivocally express or show such qualification, alteration, or condition. If the acceptance in question be considered as qualified, it must be by construing it, as if the drawee had inserted, what he has omitted, the word "only;" and what, if he so meant, the rules of construction, I think, require that he should have stated. The words, "payable at Sir John Perring's and Co., bankers, London," may mean, either that the bill *may* be paid there, or an intimation that it *will* be paid there, (that is, if the holder bring it there); or it may be intended as an obligation binding also upon the holder, that it *shall* be paid there, and there only. But if the writer had meant the last, I think that, in order to bind the holder to consider that he did so mean, he should so have expressed himself.

For these reasons, I am of opinion, that the acceptance in question, so as aforesaid alleged in the declaration, is to be considered, not as a qualified, but as a general acceptance to pay, with an additional engagement or direction for the payment thereof at the specified house; and, consequently, that the holder *215] was not bound to present it at that house for "payment, and to aver, in the declaration, that the same was presented at that house for payment.

But, supposing that this acceptance be to be considered as a qualified acceptance to pay the bill at the specified house, still the first question proposed to us

by your lordships, involves a further question; for it would not in my opinion, from thence follow that the holder was bound to present it at that house for payment, and aver in the declaration that it was so presented; for I still think, that the holder would not, even in that case, be, by law, bound so to present it, or so to aver in the declaration.

The acceptance, even taking it to be a qualified acceptance, is still, I think, an undertaking to pay the bill at a particular time and place, absolutely and at all events, and not subject to any *expressed* or implied condition, which must previously be performed by the holder. Upon a promise or undertaking, either to pay a bill of exchange or money, or to do any other particular act, whether at a particular time and place or not, the very non-feasance alone is a breach of the contract, and the promisee need do no more in support of his action for such breach than to prove the promise: the non-feasance being a negative, the feasance, or that which in law is an excuse for it, is matter purely of defence, and the *onus probandi* thereof lies upon the defendant. The person, therefore, so promising or undertaking, in order to defend himself, must either establish, that he has done the thing according to his engagement, or he must excuse his non-performance. It is not sufficient for a defendant in his excuse to say, that the plaintiff was not present at the time and place to demand and receive the money; but he must, in order to defend himself, allege and prove, that he did all in his power towards the performance, and that his not doing more was owing to the refusal or default of the plaintiff. He must establish either a tender and refusal, or that he, the defendant, was ready at the time and place to pay, but that the plaintiff did not come, nor was present to receive. The circumstances excusing the non-performance, and throwing the fault on the plaintiff, are matters in defence. This appears, I think, by Lord HOBART's opinion in *Baker v. Spain*, Hob. 8, and by the resolution of the Court of *Common Pleas, there cited, in Busby's case, as to the payment of rent, which is [*216] payable on the land. So Littleton says, Litt. s. 340. "Also upon such case of feoffment in mortgage, a question hath been demanded, in what place the feoffor is bound to tender the money to the feoffee at the day appointed, &c. And some have said upon the land so holden in mortgage, because the condition is depending upon the land. And they have said that, if the feoffor be upon the land there ready to pay the money to the feoffee at the day set, and the feoffee be not then there, then the feoffor is quit and excused of the payment of the money; for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him, for he is bound to seek the feoffee, if he be then in any other place within the realm of England." The difference of opinion, there, was upon this point; viz. whether the mortgage-money was to be paid at a particular place, viz. upon the land or not; but, in either case, whether it was to be there paid or not, the feoffor who was to pay the money, was bound to do all in his power towards his performance, before he could be excused for his non-performance. *If no time be fixed* for the performance, then, indeed, the obligor, who is to pay the money at a particular place, is to do more, (and this doctrine should be remembered when the case of *Saunderson v. Bowes* comes to be considered); he must, according to Co. Litt. 211 a, "give the obligee notice, that, on such a day, at the place limited, he will pay the money, and then, the obligee must attend there to receive it; for, if the obligor then and there tender the money, he shall save the penalty of the bond for ever." Lord COKE then adds; "The same law it is, if a man make a feoffment in fee upon condition, if the feoffor, at any time during his life pay to the feoffee 20*l.* at such a place certain, that then, &c. In this case the feoffor must give notice to the feoffee when he will pay it, for, without such notice as is aforesaid, the tender will not be sufficient." In both these cases, therefore, in order to save the bond or feoffment, the obligor and feoffor must attend and be ready with the money at the place, though the obligee or feoffee be absent; for the tender, of which he

*217] there speaks, is a tender (or rather what he calls *a tender), though the obligee or feoffee be absent; for he is speaking of a tender, which would not be an excuse without such notice, which is, therefore a tender by the one in the absence of the other; and he immediately adds, "but, in both these cases, if at any time the obligor or feoffor meet the obligor or feoffee at the place, he may tender the money." The forms of declaring, not only upon awards, but upon other instruments for the non-payment of money at a particular place, are confirmatory of this doctrine. In Rastell's Entries are the three precedents; two in debt on bills obligatory for money to be paid at particular marts or fairs, pp. 158 and 322, and the other for rent, payable at a particular place on particular feasts, 175. The declarations did not contain any allegation of presenting the bills for payment, or any demand of the money at the marts, fairs, or place; but to one of those declarations, one upon some of the bills obligatory payable at different marts or fairs, the defendant pleaded, that he was at the fairs ready to pay the plaintiff, if the plaintiff had been there, and would have delivered to him the bills aforesaid, and, that neither the plaintiff, nor any for him, was then there to receive the same, with an allegation that he has been always since ready to pay, and a *proferit* of the money into court. A bill of exchange, in an action against the acceptor, stands, I think, upon the same footing as a bill obligatory, or any other engagement for the payment of money, so far as regards the necessity of alleging in the declaration, or of proving at the trial a presentment of the bill or a demand of the money. In an action against the acceptor, where he accepts generally, such allegation is never made, nor such proof required or given: though such a presentment is, no doubt, usually made *in fact* in such cases, before the action is brought, yet, the nature of the instrument itself (*viz.* a bill of exchange) has not rendered such an allegation or proof necessary, except where the action is brought to charge the drawer or endorser. The nature of the instrument, therefore, cannot, as it seems to me, make such allegation or proof more necessary where the acceptor adds a place for payment, than in other cases where the obligor or promisor adds a place for payment.

*218] *In either case, such allegation or proof is, I think, not requisite on the part of the plaintiff; but, if the defendant or his bankers, or any one for him, had his money ready at the time and place, and would have paid it if the bill had been then and there presented for payment, it is matter of defence, and may be pleaded by him; which removes, I think, the hardship and mischief which, it is supposed, may result from not requiring an allegation and proof of presentment for payment at the specified place to be made and given by the plaintiff. Independently of the question of general or qualified acceptance, Lord ELLENBOROUGH, and my brother BAYLEY, in *Fenton v. Goundry*, both of them acceded to and confirmed this reasoning, as will be seen in 13 East, 470 and 472. Their opinions, in that case, upon this point, appear to me to be material in showing, that the case of *Saunderson v. Bowes*, which was determined by the same judges very shortly afterwards, was determined on grounds not at all inconsistent with their opinions in their decision in *Fenton v. Goundry*. My brother BAYLEY, too, upon another occasion, at *Nisi Prius*, in Hilary term, 1809, in *Wild v. Rennards*, 1 Campb. 425, note, held the same doctrine, that if a promissory note is made payable at a particular place, in an action *against the maker*, there is no necessity of proving, that it was presented there for payment; and, in Michaelmas term, 1810, in *Nicholls v. Bowes*, 2 Campb. 498, Lord ELLENBOROUGH held the same. But, it is said, that the decision in *Saunderson v. Bowes*, 14 East, 500, in Michaelmas term, 1811, by the Court of King's Bench, and the decision of *Bowes v. Howe*, 5 Taunt. 30, in Trinity term, 1813, by the Court of Exchequer chamber, which is founded thereon, are inconsistent with this doctrine. The above precedents in Rastell were not known or, at least, not brought forward in either of those two cases; and, if those two cases

were not distinguishable from the present, but were so much in point as, at first, they may appear, it might be for consideration, whether those cases were not still open to a revision, like the decisions which for a time prevailed in favour of actions upon legacies, and of actions against feme covert with separate maintenances. But, when those two *cases come to be looked at and considered, they are, as it appears to me, very distinguishable from the present, and also from *Fenton v. Goundsry*, on this very point. In the present case, and in *Fenton v. Goundsry*, the instrument declared on, a bill of exchange, was payable *at a certain time*. In *Saunderson v. Bowes*, and in *Bowes v. Howe*, the instrument declared on (a promissory note) was *not payable at a particular time*, but generally, entirely at the pleasure of the holder of the note, and so Lord ELLENBOROUGH observes, 14 East, 504, where he distinguishes *Saunderson v. Bowes*, from cases where money was to be paid, or something to be done *at a particular time*, as well as place. The cases of *Saunderson v. Bowes*, and *Bowes v. Howe*, were both cases of promissory notes of the Workington bank, payable on *demand* to bearer at the Workington bank. The note being made payable to bearer, not at any specific time, but merely *on his, the bearer's demand*, the promisors could not comply with the above-mentioned rule laid down in Co. Litt. 211 a, of giving notice when they would pay the money at their bank, as they could not know who the bearer was, *till the money was demanded*. Nor was it to be paid but *upon demand*, which might, therefore, be deemed a condition precedent, quite consistently with my reasoning, and also, with Lord ELLENBOROUGH's and my brother BAYLEY's, as applicable to cases where the money was to be paid at a time and place certain; and, if the demand thus became in those two cases a condition precedent, the place as well as time of the demand must necessarily form a part of that condition, and may require to be averred, as it was in those two cases decided.

For these reasons, therefore, I think, even if the acceptance as stated in the first count be to be considered as a qualified acceptance, that the holder was not, in the present case, bound to present it at the house for payment, or aver in the declaration that the case was so presented.

In answer to the third question proposed by your lordships, I think, that if A. draw a bill upon B. in favour of C. for 100*l.*, and C., without the previous authority or subsequent assent of A., take an acceptance for the bill for the whole of the 100*l.*, but an acceptance qualified as to the *time or place of payment, C. could not maintain an action *upon the bill* against A. [220]

In the case put by this question, the drawer has a right, I think, or at least may be considered as having reason to expect, either that this bill, if accepted, will be accepted to be paid in such manner as he has required, that is to say, according to the tenor and effect of the bill, and the usage and custom of merchants; or, that due notice will be given by the person taking the bill from him, according to such usage and custom, in case the bill be not so accepted. He may be injured, if the bill be not so accepted, as he has required, (*prima facie*, at least, it is, I think, to be so considered); and, in default of such acceptance, he has a right, I think, to due notice of such default, in order that he may take such steps as he may think proper to avert such possible injury. The holder may either receive or refuse a qualified acceptance. If he refuse, he must give due notice; and, if the bill be a foreign one, he must also protest it, in order to charge the drawer. If he do not refuse, but do receive the qualified acceptance, in that case, by assenting to the qualifications imposed by the acceptor in varying the time and place, he becomes a party to a fresh and different contract with the acceptor, to which the drawer was neither party nor privy: the contract is an entirely new one, assuming a new shape; the bill is converted into, and becomes a different or new bill, having a different tenor and effect from the old one *viz.* such as the qualifications of the acceptance, either as to time or place, have engrafted into it. C., by taking a different security, *viz.* this qualified

acceptance, instead of having the one which the drawer had a right, or had reason to expect, and which C. was to require should be given him, has, I think no right to maintain an action against the drawer upon this bill, the nature and effect of which has been altered by his having taken this qualified acceptance of it. In *Boehm v. Garcias*, 1 Campb. 425, note, (sittings after Michaelmas term, 1807,) it was held by Lord ELLENBOROUGH, that the drawer has no right to vary the acceptance from the terms of the bill, unless they be unequivocally and unambiguously the same; and, therefore, where an action was brought [221] against the drawer on a bill *drawn at Lisbon, payable in *effective*, and not in *Vals reals*, where the drawers offered to accept it, payable in *Vals denaros*, (another sort of currency, which was refused,) Lord ELLENBOROUGH held, that the plaintiff had a right to refuse this acceptance, though the defendant proposed to show, that *Vals denaros* were sufficient to answer what was meant by *effective*; and wherever the holder may refuse the acceptance by reason of its being qualified, (as he may, I think, wherever the same is qualified, either as to time or place,) he cannot, I think, if he take the acceptance, sue the drawer upon the bill.

In answer to the fourth question proposed by your lordships, I think, that if B. was debtor to C. in 100*l.*, previous to his so drawing upon B., in favour of C., to the amount of 100*l.*, C. could, upon A's refusing his assent to an acceptance, qualified as mentioned in the third question, maintain an action upon the original debt against A., without delivering to A. the bill so accepted; in case, at the time the bill was drawn, B. was also indebted to A. in a like sum of 100*l.*

The bill itself, having been dishonoured, has become no satisfaction for the original debt; the right of action upon the original debt, therefore, remains: and though, if A. pay or tender to C. the original debt, with the expenses, &c. incurred upon the dishonoured bill, he will be entitled to have that bill delivered up again to him; yet, until A. has so done, the right to the bill, as it appears to me, which was given by him to C. as a security for, or in order to discharge that debt, remains in C., who may, I think, bring an action either upon the original debt, or upon the bill; or may bring an action including both those causes of action, in case they be of such a nature as to be capable of being joined together in one action. The original debt is not extinguished, but the right of action upon it remains, or is revived by reason of the dishonour of the bill; and C., I think, has a right to retain the bill, which was given to him as a security, or for the discharge of his debt, and to use it either as a ground of action upon itself, or as a medium of proof for establishing his original debt: and the circumstance of B's being also indebted to A. in a like sum of 100*l.*, appears to me to make no difference as to C.'s rights of action; for A., only by doing what by law he is bound to do, (namely, by payment of his debt, &c. to C.) may entitle himself to the possession of the bill, and [222] thereby *avoid any injury, which he may, otherwise, sustain by the want of it in seeking his remedy against B. for the recovery of that debt.

PARK, J. With respect to the first question proposed by your lordships to the judges, I have no difficulty in stating it to be my humble opinion, that, as the bill of exchange now under discussion is alleged to have been accepted according to the usage and custom of merchants, payable at a particular banker's in London, the holder was bound to present it at that house for payment; and to aver in his declaration, that the same was presented at that house for payment.

To come to that conclusion, it appears to me to be only necessary to consider, who the parties to the contract are; and what contract the defendant on this record has entered into. The plaintiff, or the payee, it is true, originally took a bill drawn upon the defendant generally: but, when the defendant had that bill presented to him for acceptance, he said by his acceptance, I do not choose to enter into this general engagement, for, my avocations may, at the time when the bill shall become due, call upon me to be in some distant part

of the kingdom; and, therefore, both for your convenience and mine, I will specially accept it, payable at a particular banker's, or where my strong box or money is; and there you shall go for your money, and not follow and arrest me at a place where I have none: this is the defendant's contract. I admit that the holder might refuse to take such an acceptance; but, having taken it, can he enforce the contract against the contractor, without showing, that the contractor has not complied with his own conditional acceptance? May not the acceptor justly say, if the holder should attempt to enforce it contrary to the acceptor's engagement, *non habet in fædera veni?* I think he may; for, that the acceptor has a right to make a special acceptance differing from that which the drawer had wished to impose upon him, as to time, place, or amount, is admitted by those who argue for the defendant in error. This has ever been considered as law from the time of Marius, who wrote in the 16th century on bills of exchange, Mar. p. 17, 4th ed. The law upon these points, both [223] as to the right of the drawee to make a special acceptance, and, as to the right of the holder to refuse it, is well stated, as your lordships will find, in *Petit v. Benson*, Comb, 452. If, then, the drawee may refuse to enter into any other than a special acceptance; when he has made it, and it is received by the holder, surely, it becomes as much the original contract of the acceptor, as if he had written a promise to pay on certain conditions; or had promised to pay at a certain banker's, and no where else. The true sense of the case seems to be, and the principle is, that, whenever the place, at which the contractor is to perform it, forms a part of his express contract, and the duty is not merely collateral to it, it is necessary both to aver and prove a failure in that precise point on the part of the defendant. Thus, in 1 Rolle's Abridgment, tit. *Condition*, p. 444, l. 7, and p. 445, l. 52, it is said, "If a place of payment is limited by the condition, the party is not bound to pay in any other place." Here, the duty is created by the instrument itself, with certain limits and qualifications. No duty, to be perfected by the acceptor, arose anterior to the very instrument itself; and the acceptor can only be answerable to the extent of his engagement, by his qualified acceptance.

If we were to speak of the convenience of this or that practice, there can be no question, that it would be most convenient, that the presentment of the bill at the place where it is made payable should be deemed a condition precedent; for, it would be very inconvenient, that acceptors, such as the original defendant, should be made liable to answer every where, when it is notorious that they have made provision at a particular place, where alone they engage to pay. There is no antecedent duty as against the defendant, save that arising on the bill; and, therefore, the instrument or bill must be looked at for the purpose of seeing what the duty is.

I do not think, my lords, that this case has been fitly compared to the case of bonds; for, there, the penalty creates the debt, and the party is liable upon it, but is to discharge himself from the penalty by bringing himself within the terms of the condition; that, therefore, must be matter of defence. [224] But, where a suit is in *assumpsit* upon a contract, the plaintiff must show, that he has done every thing which lay upon him to do, in order to bring himself within the contract, and entitle him to sue upon it. Now, here, by the terms of this acceptance, a promise is made by the acceptor to pay at Perring's and Co.; the plaintiff, who sues, then must bring himself within those terms by showing, that he made a demand at the place where the defendant said he would pay; and he cannot be made liable beyond the extent of his contract. Where a defendant contracts generally to pay a sum of money, he is liable to a creditor every where: but, where a person binds himself to pay at a particular place, he is not liable at any other place, till default be made at the particular place. For, otherwise, suppose a bill drawn upon one just before going the circuit, (and this case is put by one of the most learned judges who ever adored

the Court of Common Pleas, I mean Mr. Justice CHAMBRE,) in *Gammon v. Schmoll*. 5 Taunt. 350, which will fall due during the absence of such drawee; such a person living in chambers leaves no servant on his departure, excepting, perhaps, a laundress; what can be done in such a case, except to deposit the money with a banker, and make the bill payable at that bankers? Otherwise such person would be liable to be arrested at any place in the course of his journey, where he might have no money, which, indeed, he would be the less likely to have after making provision at his banker's. I agree with that learned judge, that it is a great convenience to the public to maintain these special acceptances.

But, it is said at the bar, if you can show that you had your money at your banker's, you would have a complete defence. Is it, then, no vexation to be causelessly arrested? Is a law-suit no vexation? Is it nothing to be 20*l.* or 30*l.* out of pocket, though you gain your cause? And this evil is only met by the trifling inconvenience of an obligation on the plaintiff to call a witness to prove a presentment. Indeed, if we speak of inconvenience, it is all the other way; for, instead of the trifling inconvenience arising to a holder from the necessity of calling one witness to prove a presentment, every banker must, if the other view of the case be adopted, keep a number of clerks to go daily *225] to all parts *of the town, for the purpose of receiving payment of bills. Nay, so greatly was this inconvenience felt, that your lordships are probably aware that the Bank of England will not discount any bill that is not payable at a banker's.

But we have been told at the bar, that the weight of authority is against the plaintiff in error. Let us examine the cases, and see whether the decisions in the Court of King's Bench, and one or two at *nisi prius*, before Lord Chief Justice GIBBS, carry with them the same weight of reason as those decided by the Court of Common Pleas sitting in bank; or, whether the Court of King's Bench has, in this respect, been consistent with itself; a mode of discussion, which I can with much more satisfaction recommend to your lordships' adoption, than a consideration of the weight due to individual judges, all of those who are concerned in these decisions being most highly respectable.

The first case immediately applicable to this is that of *Smith v. De la Fontaine*, of which there is a short note in my brother BAYLEY's Treatise on Bills of Exchange, p. 129, note b, 3d ed.: however, a more full account is given of it in a note to Mr. Holt's *Nisi Prius Cases*, 366, which is taken from a manuscript of my brother HOLROYD; and there seems no doubt, that in 1785 Lord MANSFIELD at *nisi prius*, and the Court of King's Bench, afterwards, decided, that words similar to those here used were not words restricting or qualifying the acceptor's liability, but rendering him liable generally; and that it was not necessary to prove a demand at the particular place in an action against the acceptor. But how has this been followed up? The first case is that of *Lyon v. Sundius*, 1 Campb. 422, a mere *nisi prius* opinion, before the decisions of either *Callaghan v. Sylett*, or *Fenton v. Goundry*. Then came the case of *Fenton v. Goundry*, 13 East, in which the court undoubtedly held that doctrine, which is now under discussion; and which treated an acceptance like the present not as a conditional acceptance, but as a mere expansion of the promise to pay. But how is that consistent with the doctrine laid down in *Parker v. Gordon*, 7 East, 385, by two of the judges, Lord ELLENBOROUGH, C. J., and GROSE, J., who *were parties to the decision in *Fenton v. Goundry*? *Parker v. Gordon* was an action against the drawer; and I, therefore, do not quote the case as an authority, except to show that such words as these were considered as a special acceptance. "If a party (says Lord ELLENBOROUGH in the last mentioned case) choose to take an acceptance at an appointed place, it is to be presumed that he will inform himself of the proper time for receiving payment at such place, and he must apply accord-

ingly." And, in *Elford v. Teed*, 1 M. and S. 28, his lordship says that the case of *Parker v. Gordon* was conformable with the doctrine which he had usually held. LAWRENCE, J., says, in *Parker v. Gordon*, "The party might have refused to take the *special acceptance*; but if he choose to take the acceptance in that manner, *payable at the banker's*, does he not agree to take it payable at the usual banking hours?" And LE BLANC, J., says, in the same case, "If a party will take an acceptance, payable at a banker's, he must present it at a proper time, according to the known method of conducting the banking business; otherwise the greatest inconveniences to trade would ensue."

Two very modern cases have been quoted to your lordships to show, that Lord Chief Justice GIBBS concurred with the decision of the Court of King's Bench in *Fenton v. Goundry*; namely, the cases of *Head v. Sewell*, and *Richards v. Lord Milvington*, Holt, N. P. C. 363. I will speak of *Head v. Sewell* first. It is sufficient to observe, that it was only a *nisi prius* case: next, it is so singular a case, that, either the note is incorrect, or the opinion of the lord chief justice is not delivered with that very learned person's usual accuracy and precision. For, in the year 1818, he begins his observations by saying, that, after 35 years' experience, he had never known the objection to prevail, and, therefore, could not admit the necessity of the proof. What had he not known of the case of *Callaghan v. Aylett*, decided in 1811, 5 years before, in the Common Pleas, by Mr. Justice HEATH, Mr. Justice LAWRENCE, and Mr. Justice CHAMBRE, as eminent persons as ever sat on that bench; and which case, in consequence of its having been much opposed the following term in *Fenton v. Goundry*, made them the common talk in Westminster Hall? Had he not heard of the case of *Gammon v. Schmoll*, then quoted to him, and decided two years before, in the very same court by his then colleagues, Mr. Justice HEATH, Mr. Justice CHAMBRE, and the very learned person who afterwards succeeded him in the chief justiceship, in both of which cases the objection prevailed? And then again, though his lordship is stated to have said, that he never knew the objection prevail, he concludes by saying, he knows there are conflicting cases. The other case of *Richards v. Lord Mil-sington* he decides that he may preserve his own consistency in a former case of *Price v. Mitchell*, 4 Campb. 200: but, upon looking at that case, it will be found a mere memorandum at the foot of a note, which never was held to be a condition, but a mere *memorandum* or direction. I, therefore, do not consider these cases as adding much weight to the authority of the King's Bench upon this occasion.

But I find the King's Bench in *Saunderson v. Bowes*, 14 East, 500, which was confirmed by a unanimous judgment in the Exchequer chamber, *Bowes v. Howe*, 5 Taunt. 30, deciding diametrically opposite to the case of *Fenton v. Goundry*: and every word of the judgment of that great and eminent judge, Lord ELLENBOROUGH, is, in my mind, conclusive in favour of the plaintiff in error. Agreeing, as I do, with the learned editor of the Treatise on Bills of Exchange, Bayley on Bills, 185, note 1, 3d ed., that it is difficult to reconcile in principle with the case of *Saunderson v. Bowes*, that of *Fenton v. Goundry*, and *Saunderson v. Bowes*, being the last in decision, ratified by the decision of the twelve judges of England, and most agreeable to good sense, reason, and convenience, I think that it ought to prevail. The only difference between *Saunderson v. Bowes* and this case is, that *Saunderson v. Bowes* was an action against the maker of a promissory note; this case is against the acceptor of a bill of exchange: but I need not inform your lordships, that the courts in Westminster Hall have long thought the analogy between notes and bills so strong, that the rules established as to one ought also to prevail as to the other; *Heylyn v. Adamson*, 2 Burr. 669, *Brown v. Harraden*, 4 T. R. 148, fully prove this position. Then let us read the case of *Saunderson v. Bowes*; [228] and if "bill" be read for "note," is not every word of Lord ELLENBO-

RONON's luminous reasoning decisive of the present question? (Here the learned judge read the case and judgment in *Saunderson v. Bowes*, observing that in that case the Court of King's Bench held presentment at the banking-house necessary.) *Bowes v. Howe*, 5 Taunt. 30, contains the affirmation of this proposition, though there was a reversal upon another point in that particular cause. And, in conformity to that opinion, Lord ELLENBOROUGH, in a subsequent case of *Roche v. Campbell*, 3 Campb. 247, held, that it was a fatal variance in a declaration not to state that the note was payable at a particular place, where the note was so payable. And his lordship's language is peculiarly emphatical and applicable to this case, for he says "This declaration represents the promissory note as containing an absolute and unqualified promise to pay the money. But, by the instrument produced, the maker only promises to pay upon the specific condition that the payment is demanded at a particular place. We have lately held (alluding to *Saunderson v. Bowes*) that, where the place of the payment is mentioned in the body of the note, it forms a material part of the instrument." So, here, the acceptor only undertakes to pay upon the specific condition that the payment is demanded at a particular place: this, and no other, is the contract of the acceptor.

Having thus shown the inconsistency of these decisions, and that *Saunderson v. Bowes* has not only had the judgment of the King's Bench in favour of that opinion, which I presume to deliver to your lordships, but the confirmation, as to this point, of the whole Exchequer Chamber, can I hesitate in saying, that the strong current of authority is in favour of the plaintiff in error, when I add, the authority of Judges HEATH, LAWRENCE, and CHAMBRE, in *Callaghan v. Aylett*, declaring that, doubtless, there may be a qualified acceptance of a bill which a holder is not bound to receive, but, that if he acquiesces in it, he must conform to the terms of the acceptance; and the further authority of Judges HEATH, CHAMBRE, and DALLAS, in *Gammon v. Schmoll*. Mr. Justice HEATH, in *Gammon v. Schmoll*, 5 Taunt. 353, treats it as a condition precedent, which "must be shown to be performed. The reasoning of Mr.

*229] Justice CHAMBRE does not seem to have been sufficiently adverted to; and nobody will deny his ability as a lawyer, and his great skill as a pleader. That learned judge says, in *Gammon v. Schmoll*, "I think the case is clear upon rules of plain common sense and understanding, without going into all the cases. A man is not bound to receive a limited and qualified acceptance, he may refuse it, and resort to the drawer; but, if he do receive it, he must conform to the terms of it."—"What is the meaning of these words, *accepted, payable at?* They have a meaning: they impose a condition; and the person receiving such an acceptance must comply with the condition, and in pleading, must show his compliance. It would greatly circumscribe the negotiation of bills of exchange if this were not so; for they would, instead of being of general accommodation, be restrained in their use to such persons in trade as have a fixed place of business." I have already endeavoured to show your lordships that the inconvenience to holders of bills and to bankers would become ruinous by the number of clerks which they must employ, if such an acceptance is to be held to make the acceptor universally liable.

On these authorities, and upon the principles of common sense and understanding I am of opinion, on the first question, that the holder was bound to present this bill at Sir John Perring's house for payment, and to aver that it was so presented.

As to the second question proposed by your lordships to the judges, viz. whether such an acceptance is to be considered in law as a qualified acceptance, I answer, that the whole of my reasoning, with which I have troubled your lordships, is founded upon the affirmative of that proposition. All the text writers upon bills of exchange are clear on this point. I take it, that any acceptance varying from the absolute tenor of that which the drawer expected by

the language which he used in drawing the bill, either in the sum, the time, the place, or the mode of payment, is a conditional acceptance, which the holder is not bound to receive: but, if he do, the acceptor is liable for no more than he has undertaken. This doctrine of qualified acceptance, as to part of the money, is spoken of in *Marius*, pp. 17, 21, and in *Mollov*, b. 2 ch. 10, [230] s. 21. So, in the latter book, a partial acceptance as to time is mentioned, id. s. 28. This is confirmed in *Beawes' Lex Mercatoria*, p. 481, 4th ed. fol., and by Mr. Justice *BAYLEY*, *Bayley on Bills*, pp. 85, 86, 3d ed. And it was treated as a qualified acceptance in *Saunderson v. Bowes*; and by Mr. Justice *LAWRENCE*, in *Parker v. Gordon*; and again in *Callaghan v. Aylett*, and *Gammon v. Schmoll* in the Common Pleas: I, therefore, feel no difficulty in stating to your lordships, that I conceive this to be a conditional acceptance.

The third question, in my view of the case, is not of difficult solution. *Marius* supposes, p. 17, that if the holder take from the acceptor an acceptance, even for a part only of the money drawn for, he may do so, provided he protests and gives notice to the drawer, and the bill is not thereby void; nor, according to what he says in page 21, does it prevent the holder from having recourse against the drawer. This is stated in the case of *so material* a change, as a defalcation of part of the sum drawn for. But to the case put by your lordships, I answer, that, if the qualification, either as to time or place, works neither injury nor inconvenience to the drawer, the holder is not prevented (in case of non-payment) from his remedy against the drawer, because he has taken such qualified acceptance. Your lordships will perceive that I state, where it neither produces injury nor inconvenience. Now in the case, out of which this question arises, it neither produces the one nor the other: but it is a custom productive of great convenience to every one concerned in trade, and without which qualification, I have already stated to your lordships, (and I know the fact to be so,) bills of exchange are not discountable.

As to the fourth question, I am of opinion, that C. could not maintain his action for the original debt against A. the drawer, without delivering up to him the bill so accepted. Because, having once accepted such bill in lieu of, and in satisfaction of his debt, he cannot recover for the original debt without relinquishing the supposed security; which, *being an acceptance by B., [231] (whom the question supposes to be indebted to the drawer,) will amount, at all events, to an acknowledgment of the debt. For, although it is not always true that the drawee is a debtor of the drawer, yet, perhaps, when the drawee accepts, it is *prima facie* evidence of a debt. The case of *Kearslake v. Morgan*, 5 T. R. 513, where it was held, that to an action for goods sold and delivered, it was a good plea to say that the defendant had endorsed to the plaintiff a promissory note, payable to him, the defendant, "for and on account of" the said debt, is not inapplicable to this question to show, that C. could not maintain an action for his original debt while he held in his hands a bill given to him by the defendant to that amount. I, therefore, answer to the fourth question proposed by your lordships in the negative.

BAYLEY, J., (after stating the case.) In answer to the first question proposed by your lordships, I humbly submit, that the effect of such an acceptance is this, that to entitle the holder to sue the drawer or endorser, it casts an obligation upon him to present the bill at Sir John Perring's and Co. for payment, and to aver in his declaration, that the same was *so* presented; but that, as against the acceptor himself, the holder is not bound so to present it; that he is under no obligation to aver any such presentment in his declaration; and, that the only consequence of his neglect to present, is this, that the acceptor may set up any loss he has sustained thereby as a matter of defence. This question is raised upon a demurral to the plaintiff's declaration. The point, therefore, is not whether a neglect to present may not, even as against an acceptor, in some cases constitute a defence; but, whether the presentment is, or is not an

essential part of the plaintiff's title. A presentment is a demand at the place of payment, and to determine this point, it will be of assistance to call the attention of your lordships to the rules which the law has laid down as to cases in which a demand is or is not unnecessary. And, one of these rules I take to be this, that where a man engages to pay upon demand what is to be considered his own debt, he is liable to be sued upon that engagement, without any *previous demand; and that a tender or readiness to pay, must come by way of defence from the defendant; but, that, if he engage to pay upon demand what was not his debt, what he is under no obligation to pay, what but for such engagement he would never be liable to pay to any one, a demand is essential, and part of the plaintiff's title. If a man make a note payable on demand, it is settled by law that a special demand need not be stated in the declaration, nor proved upon the trial. And what is the reason? Because the note is considered as given for what is to be considered the party's own debt. In common actions of assumpsit, the promise is always stated to be to pay when thereto afterwards requested, yet a special request is never stated or proved; and the distinction in this respect is correctly taken in *Birks v. Trippet*, 1 Saund. 33 a. That case was *assumpsit* on a promise to pay 40*l.* upon request, if the defendant did not perform an award between him and the plaintiff; the defendant pleaded a bad plea, to which there was a demurrer: and then Saunders for the defendant objected, that the plaintiff had not laid any request of the penalty of 40*l.* "For the declaration is, that the defendant promised to pay upon request, if he did not perform the award; and the request is material, for he took a difference between a mere duty and a collateral sum. For, where a mere duty is promised to be paid upon request, as if, in consideration of all moneys lent to the defendant, he promised to pay them again upon request, no actual request is necessary, but the bringing of the action is a sufficient request; but otherwise it is upon a promise to pay a collateral sum upon request; for, there, an actual request ought to be made before the action brought. Now, here, the promise of payment of 40*l.* upon request is collateral, and is a penalty and not a precedent duty, and, therefore, there ought to have been a request before the action brought:" and of that opinion was the whole court, and judgment was given for the defendant. There are many other cases, see 1 Wins'. Saund. 33 a, note 2, to the same effect, but the principle is so well established, that it is unnecessary to cite them. Another rule upon the subject of demands I take to be this, that the fixing a special time and place for payment will not make an actual demand at that time and place necessary, as part of the plaintiff's *title in a case, in which, otherwise, the demand would not be necessary; but that, in that case, also, a tender or readiness to pay at the time and place is matter of defence, and of defence only. An award directs money to be paid at a given time and place. In an action on such award, does the declaration allege any demand at that time or place? certainly not. Upon an application *inde* for an attachment, is not the attachment constantly granted, though personal demand was not made at the time or place; and though attendance at the time or place is not stated? In *assumpsit* on the award, the declaration would be, that the defendant promised to perform the award, and that the award directed payment at a given time and place: in substance, therefore, incorporating the promise and the award together,) it is a promise to pay what is properly a debt of the defendant's at a given time and place: in substance, therefore, (incorporating the promise and the award together,) it is a promise to pay what is properly a debt of the defendant's at a given time and place; and yet the declaration never states either attendance by the plaintiff at the place, or a demand by the plaintiff at the place: the utmost which it states is, that the defendant did not pay at the time or place, or at any other time or place. To debt on bond, the defendant, after oyer of the condition of the bond, which was the performance of an award, pleaded no award

made. The plaintiff replied an award made directing the defendant to pay the plaintiff 66*l.* at his house at Sennocke, on the 22d October, between the hours of ten and twelve, but that the defendant did not pay the 66*l.* which he ought to have paid on that day, according to the form and effect of the award, Lutw. 558. There are three precedents to this effect, in Mr. Caldwell's book upon awards, pp. 318, 322, 323, the first in assumpsit, the other two in debt: and there are many similar precedents in other books. The first stated, that an action had been brought to recover a balance of account, that the cause was referred, that each party undertook to the other to perform the award, and that the award was, that the defendants should pay *l.*, being balance of account due from the defendants, at the office of L. and M., situated in, &c., between 10 and 12 A. M. on, &c. Whereof defendants had notice; yet they did not pay the plaintiffs the said sum, or any part thereof, on, &c., at the said office of L. and M., or elsewhere, or at any other time whatever; although defendants afterwards, viz. on, &c., at, &c., were *required by plaintiffs so to pay the [*234] same. The second stated, that differences had arisen, and were referred; that the arbitrator awarded; that on a balance of all accounts between the parties, there was due and owing from defendant to plaintiff 61*l.* 10*s.*, which he directed to be paid on 10th of June, between eleven and one, at the house of one G. H., plaintiff's attorney, whereof defendant had notice; yet defendant did not pay the same, or any part thereof, at the time and place appointed for the payment thereof as aforesaid; nor hath he since paid the same, but hath wholly failed, and made default, whereby an action hath accrued, &c.—Now, upon what principle do these declarations omit to state attendance at the place, or demand at the place? Clearly upon this, that the money awarded to be paid became a debt from the defendant; that he was under a general obligation to pay, and not confined to time or place; and that, therefore, attendance at time and place was not part of the plaintiff's title; but readiness to pay at time and place was matter only of defence. Mr. Caldwell, indeed, p. 194, lays it down, that where the money is to be paid at a certain time and place, the plaintiff must aver that he attended there at the time appointed, and remained until the period within which payment was to be made; but this position is evidently founded on a mistaken notion of the case of *Phillips v. Knightly*, Fitzg. 53; 1 Barnard, 84: there, according to Fitzgibbon, the plaintiff was, upon receiving the money, to give the defendant a covenant of indemnity; there were, therefore, to be two concurrent acts, viz. the payment of the money and giving of the covenant; and the plaintiff could not sue for the money without showing a readiness, on his part, to give the covenant, which he had not done. This case, therefore, is not at variance with the established precedents, and I have only noticed it, that a mistake in a useful book may be corrected. Another class of cases, which I will mention, are cases of rents. Rent is reserved in some cases generally, and then the proper place for the payment, the place appointed by law, is the land out of which it issues. In some cases it is expressly made payable at some other place: and yet, in either case is a precedent, either in debt on the *reddendum*, or in covenant, of an averment, that *the plaintiff was at the time [*235] and place to demand it. The declaration, in such cases, is always general, that on such a day so much of the said rent became due and in arrear, and that defendant, although often requested, had not paid. So, in covenant upon a mortgage-deed to pay the mortgage-money on a given day, in Lincoln's Inn Hall, or in any other place; or in debt upon a single bill to pay money for a past consideration, at a given place, the declaration never alleges attendance or demand by the plaintiff; but, merely alleges non-payment by the defendant. Now, what can be the principle of all these cases? What but this, that the money to be paid is a debt from the defendant; that it is due generally and universally; that it will continue due, though there be a neglect on the part of the creditor to attend at the time and place to receive: that it is matter of defence on

the part of the defendant to show that he was in attendance to pay, but that the plaintiff was not in readiness to receive; and that defence will, generally speaking, be in bar of damages only, not in bar of the debt, and must be accompanied with a bringing of the debt into court. The instances in which this is made matter of defence will throw light upon the point. Most of those instances occur in demands for rent; but no distinction in principle can be drawn between cases of rent, and cases of other debts. I will mention some of these cases. Lease for years, rendering 10*l.*, 22 H. 6, 57, pl. 7, yearly at Easter, and for performing of covenants each bound in 20*l.* Non-payment of rent at Easter, and, therefore, the 20*l.* claimed. Plea, ready to pay at the day on the land, and no one attended to receive; and the plea was held good. In *Kidwelly v. Brand*, Plowd. 69; Dyer, 68 a, rent of land at Lomer was reserved, payable at Hide: and the question was, whether the landlord could re-enter for non-payment of rent without demand; it was adjudged, (though there are cases since to the contrary,) that he might: the reason given is, that the rent being made payable at a place off the land, it lost its character of rent, and became like a sum in gross, and then it was the tenant's duty to offer it, not the landlord's to demand; "Lessee ought to offer it for his own indemnity, as the obligor ought upon an obligation, or as the grantor of an annuity ought to offer the annuity at the day, to excuse himself of damages." **Buskin v. Edwards*, Cro. El. 415, 535, corrects that case, by showing that a payment due from a tenant still remained a rent, though made payable at the Royal Exchange, in London. The propriety of what is said in Plowden, in case it had been a sum in gross, is not questioned. The inference, then, to be fairly drawn from the case in Plowden, corrected as it is by the case in Croke Elizabeth, is this, that if a sum in gross be made payable at a certain time and place, and the sum is properly a debt from the person who is to pay it, it is his duty to attend at the time and place and offer it, but it is not the duty of the person who is to receive it to demand it; and yet the offer is essential to protect him, not against payment of the sum itself (which, as being due, ought to be paid) but against damages.

In Brook's Abridgment, *Dette*, pl. 216, is this position:—"In debt for rent, tender on the land and refusal of plaintiff is no plea, for he shall answer to the debt; but the contrary in avowry; for, there is to be a return, and there ought not to have been distress if tender was made." Now what is the meaning of this passage? evidently this, that in debt it is no *plea* in bar of the action; it is a bar of damages only; not of the debt: and, therefore, he must answer to the debt, by bringing the money into the court upon the tender, which in the case of a plea in bar to an avowry he need not do. *Brownlow v. Hewley*, 1 Ld. Raym. 82, is an authority to show that, upon a plea of tender on the land at the day in an action of debt, the rent must be brought into court; and *Horne v. Lewin*, Id. 639; Salk. 583, to show, that, upon a plea in bar to an avowry, it need not be brought into court. In *Osborn v. Beversham*, 1 Vent. 322; 3 Keb. 800; 2 Lev. 209, in debt for rent the plea was readiness at time and place and ever since, and profert of the money. To this plea there was a demurrer grounded on two objections. First, *Non obtulit*, for, when time and place are certain, *semper paratus* without an *obtulit* is no plea. Second, It is pleaded in bar generally; it should have been in bar of damages only; and the court thought both objections good. Levinz makes a query on the first ground, because the rent is demandable, (i. e. plaintiff should have demanded it,) "otherwise," says he, "of a sum in *gross, which is payable without demand." In *Crouch v. Fastolfe*, S. T. Raym. 418, cited yesterday by my brother RICHARDSON, to debt for rent there was a plea of attendance at the day and place, that the defendant was ready to pay, and that no one came to receive. To this plea there was a demurrer, because tender was not alleged, but it was resolved to be well enough, and adjudged for the defendant. A precedent of such a plea is in

Thompson's Entries, lib. placit. 150: however, in *Horne v. Lewin*, Lord Rayin. 644, a *paratus* without an *obtulit* was held insufficient. It is immaterial to the point which I am considering, whether there ought to be a tender or not, and quite sufficient for my view of the subject if with a tender it would be a bar of damages. Now what are the legal conclusions which I draw, and the legal positions which I consider as resulting from the authorities with which I have troubled your lordships? They are these, that if a man, in respect of any debt which he owes, engages to pay it upon demand, or engage to pay at a given time and place, it is not a necessary part of the plaintiff's title to make such demand or attend at such time and place; that he is not bound in his declaration to state any such demand or attendance; that a neglect to demand or attend will not bar his right to the debt and enable the defendant to keep it; but, that the defendant may show readiness on his part to exonerate himself from any damages.

I now come to apply these principles to bills of exchange. The acceptor is, by the law and custom of merchants, considered as the principal debtor; the drawer and endorser as sureties only, liable on his default, and not otherwise. His engagement is general, that he will pay; that of the drawer and endorsers is conditional, namely, that if due diligence be used, they will pay, if the acceptor does not. The engagement of the acceptor is, either that he has effects in hand, or that he is secure of having them by the time the bill becomes due. In the language of the Lord Chief Justice EYRE, "The theory of a bill of exchange is, that the bill is an assignment to the payee of a debt due from the acceptor to the drawer, and the acceptance imports, that the acceptor is a debtor to the drawer, or at least has effects 'of the drawer's in his hands.'" The acceptor, therefore, has, or ought to have, in his hands or under his control, the fund by which payment ought to be made; and it is his duty so to apply it. The drawer or endorsers have no control over the fund, and consequently no duty with respect to it. This difference of situation and character between the drawer and endorsers and acceptors, has produced a settled distinction in the manner of suing them. The action against drawer and endorser invariably shows that due diligence has been used; the action against the acceptor invariably omits it. In an action against the drawer and endorsers, the declaration invariably avers presentment of the bill, its dishonour, and notice thereof to the defendant. In an action against the acceptor no such averments are made. Every bill is to be properly presented for payment; and, in an action thereon against the drawer or endorser, a presentment according to the usage and custom of merchants, must be averred and proved. In an action thereon against the acceptor, presentment (generally speaking) need not be averred or proved. This is clear, settled, undisputed law. Not that, in practice, such presentment is likely to be omitted: the risk of losing the responsibility of the drawer and endorsers generally secures it; but if there were to be an omission, that is no reason why the acceptor, who has, or ought to have, funds to discharge it, should keep those funds to himself, or should refuse so to apply them.

If a bill be addressed to A., in Bedford-square, and he accept it generally, in an action against the drawer or endorser, presentment must be alleged and proved: in an action against A., presentment need not be alleged or proved. If A. have changed his residence, and accepted it, payable at his new abode, does this make any difference?—presentment need not be averred in the one case—need it be averred in the other? If the necessity exist, there must be some reason for it. What is this reason? Though I am putting the case where the bill is still payable at the party's own house, and this is the case where the bill is made payable at a banker's, does this make any difference, does it vary the character or situation of the acceptor, so as to put him in the situation of a surety only instead of a principal, and if due diligence be not used, *exonerate him from all liability, and enable him to keep the money to himself?

The form of the acceptance in the case is material. The declaration states it thus : " Which bill of exchange he the said Joshua accepted, according to the usage and custom of merchants, payable at Sir John Perring's and Co., bankers, London ; that is to say, at the house of certain persons using in trade and commerce the names, style, and firm of Sir John Perring and Co., bankers, London." By whom the bill is to be paid at Sir John Perring's and Co., whether by the defendant or by Sir John Perring and Co., the acceptance does not state ; whether Sir John Perring and Co. were bankers for the defendant is not stated. In the first place, it is not in a form to require Sir John Perring and Co. to pledge their credit for the payment of the bill ; it is, at most, only an authority to them to pay, and, unless Sir John Perring and Co. choose to make themselves responsible, they can never be sued for the money. Why it is to be paid there ; whether because Sir John Perring and Co. where the defendant's bankers, or because he was an inmate or merchant of that house, is not stated. I will take it, however, for granted, for the sake of argument, that it is made payable there, because Sir John Perring and Co. were the defendant's bankers. Sir John Perring and Co. then, are to be agents for the defendants in this transaction. Will making the bill payable at an agent's change the situation of the acceptor, and make it incumbent on the holder, in an action against the acceptor, to aver and prove presentment at such agent's, when they would not be bound to aver or prove presentment at the acceptor's ? That such presentment will generally be made, there can be no doubt, because, otherwise, the security of the drawer and endorsers will be lost, but though presentment is in fact made, there may be cases in which the party may fail in proving it. The party presenting the bill may remove out of the reach of the holder, or may die. Is it right, or is it law that, because the holder fails in that link of evidence, he is to lose his debt ? Before the necessity of such averments is established, I wish to draw your lordships' attention to the consequence. If the effect of such an acceptance be to make this averment and proof essential, it follows, that the holder has a right to object to this burden, and reject the acceptance. Right to reject is admitted *in 240] *Bishop v. Chitty, Callaghan v. Aylett*, and in *Gammon v. Schmoll*, Per CHAMBRE and DALLAS, Js. Will this produce no confusion in the course of trade, when this mode of acceptance prevails to such an extent as it does ? The bill is generally left for acceptance at the house of the drawee by a clerk, and called for on the next morning. Suppose a party leaves a bill drawn on the drawee generally, at the house of the drawee, and that on calling for it he finds it accepted, payable at a banker's ; if this mode of acceptance cast an additional burden on him, he may take away the bill, strike out the acceptance, treat it as dishonoured, protest it, if it be a foreign bill, and, at once, commence actions upon it against all the parties. It may be said that this has never yet been done, and that the apprehensions are chimerical. But why has it not been done ? Because it has been, for a series of years, the rooted understanding in commerce, that an acceptance at a banker's throws no additional burden upon the holder ; but that it is merely an intimation, that there the acceptor would be ready to pay it : once establish, that such an acceptance is conditional, and that the burden of proving presentment at the banker's is thrown on the holder ; and, from that moment, every such acceptance must be rejected. What will the drawer and endorser say ? They will say, " If you take such an acceptance, you do it at your peril ; and we are discharged." The holder has no right, by the acceptance which he takes, to cast a burden upon them. They are entitled to expect, that, if any acceptance is taken, it shall be such an acceptance as does not make such additional averment and proof essential. Taking such an acceptance, then, if it has the effect contended for, would discharge them unless they had immediate notice of such acceptance, and assented thereto. It may be said, that notice then may be given to them ; but will your lordships come to a decision which imposes on the holder the necessity of giving notice to all the parties to the bill ?

If I were to state that there are daily in London one hundred such acceptances given, I should speak far within the truth. If these acceptances be conditional, notice ought to be daily sent by the post to the drawer and endorsers of each bill, not that the bill is dishonoured, but that it is accepted payable at a banker's. *The fact that no such notice is given, notwithstanding the prevalence of such acceptances and a perfect acquiescence therein, shows stronger [*241] even than positive authorities what has been the understanding, usage and custom of the mercantile world concerning them: and, bills of exchange being mercantile instruments in daily occurrence, if they have received a mercantile construction, the construction put on them by the mercantile world ought to be their construction in a court of law.

I have troubled your lordships so much at length on the principles, which in my view, govern this case, that I shall address the house but shortly on the decisions. The point came first before the court (as far as we can learn from printed reports) in *Smith v. De la Fontaine*: that case was tried before Lord MANSFIELD, in 1785, and from that time to the year 1806, the question does not appear to have been agitated. Then came *Callaghan v. Aylett*, in 1811, in which the decision was adverse to that of *Smith v. De la Fontaine*. The case of *Callaghan v. Aylett* was in the same year followed by that of *Fenton v. Goundry*; and I will only excuse the Court of King's Bench for coming to a decision on that case, (adverse as it was to the decision in *Callaghan v. Aylett*) at the moment, because Lord ELLENBOROUGH (and the learned person, while at the bar, had most extensive experience in cases of bills of exchange) laid the foundation of his judgment in *Fenton v. Goundry*, on the invariable usage, to which he adverted in energetic language: on that ground only the Court of King's Bench did not take time to consider in that case.

The case of *Fenton v. Goundry* was followed by that of *Gammon v. Schmoll*, which I will only notice on account of the case of inconvenience there put by CHAMBRE, J., and to the case put by him I will add one or two other supposed cases. A bill is brought to me for acceptance just as I am setting off for the circuit; I tell the holder that I am going to be absent from town, and that I can only accept the bill payable at my bankers: he refuses this acceptance, on the ground, that it will give him additional trouble and inconvenience; and the bill is, consequently, dishonoured. Suppose the case of a bill drawn in the West Indies, on a merchant in England, who accepts it payable at a banker's: the merchant, finding the bill not debited to him, supposes there may have been some neglect on the part of the holder, *but finds the bill protested for non-acceptance, that the person who presented it for acceptance was a [*242] notary, that the acceptance has been struck out, and the bill returned to the drawer in the West Indies; and that the holder has recovered 20 per cent., or whatever difference may have been occasioned by the existing rate of exchange beyond the nominal amount of the bill.

Many of the principles now insisted on, may seem at variance, I admit, with the decision in *Saunderson v. Bowes*, and the other cases on promissory notes. I could distinguish those cases from *Fenton v. Goundry*; for, in the latter case, the acceptance payable at the place was no part of the original conformation of the bill itself; but, in the former cases, the words, restrictive of the payment, were incorporated in the original form of the instrument. But I do not wish to answer those cases, on these grounds; for I am free to confess, that I doubt the propriety of those decisions, although I was myself a party to them; and, I think it more manly to say, that I consider my opinions, in those cases, erroneously formed, than to attempt to distinguish those cases from *Fenton v. Goundry*, by the use of nice and subtle differences. I hope, therefore, that the case of *Saunderson v. Bowes*, will not be followed as a precedent; for, as far as I can judge, the principles for which I have been contending apply to promissory notes as well as bills of exchange. The case of *Bishop v. Chitty*, Str. 1195.

proceeded partly, and, I think, principally on the ground, that there was actual *laches* on the part of the holder, and *laches* which prejudiced the acceptor. In that case, the acceptance was, "Messrs. Caswell and Mount pay this bill, when due, for Thomas Chitty;" it was, therefore, in the form entitling the holder to call upon Caswell and Mount to pledge their responsibility for the payment of the bill. In the case before the court, the holder has no right to call upon Sir John Perring and Co. to pledge their responsibility for payment; nor can they be sued if they refuse to pay it: there is no privity between them and the holder: this principle is established in the case of *Williams v. Everett*, 14 East, 582. In *Bishop v. Chitty* the bill fell due on the 2d of January, and Caswell and Mount paid till the 19th of that month, and the bill was not presented till the 21st: *Lee, C. J.*, held, that it was the loss of the plaintiff; for this acceptance [was in the nature of a draft, which is always considered as actual *payment, when a reasonable time to receive it is elapsed. The form, therefore, of the acceptance in that case, which was in the nature of a draft on Caswell and Mount, and the neglect of the holder to call to receive it, distinguish it from the case before the court. In *Sebag v. Abitbol*, 4 M. and S. 464, a bill was accepted payable three months after date, at a banker's in London: the bill, by reason of its being mislaid, was not presented for payment, but the acceptor was, some months afterwards, informed of its being mislaid, and it was held he was not discharged; and the drawer was allowed to set it off in an action brought against him by the acceptor, although the banker, at whose house the bill was payable, had failed about four months after such information was given, and though the acceptor had at all times, up to the failure of the bankers, a balance in their hands sufficient to cover the acceptance. For these reasons, considering, that the money payable by a bill, becomes by the acceptance the debt of the acceptor; that he is looked upon as the immediate debtor; that, by making his acceptance payable at his banker's, without putting it in a form to pledge his banker's liability, he only specifies a place where he, by himself, or his agent, will be ready to pay; considering, that he may have no funds at his banker's hands, or has full power to withdraw them; that much trouble, and inconvenience, and confusion, may result from holding that this is a conditional and restrictive acceptance; and, that every inconvenience will be sufficiently obviated by holding, that neglect by the holder will be matter of defence to the extent to which such neglect causes loss, I submit, in answer to the first question proposed by your lordships, that, as against the acceptor, the holder of this bill was not bound to present it at Sir John Perring's for payment, or to aver such presentment in his declaration.

On the second question proposed for the consideration of the judges, I shall content myself with saying, that, for the reasons which I have already stated, I am of opinion, that, as against the acceptor, such acceptance is a general acceptance, with an engagement or direction that payment may be obtained at the banking-house, with this addition only, that, if the acceptor should be able to prove, that, by any neglect in the holder in not duly presenting, he had sustained any loss, he should be relieved to the extent of such loss.

*In answer to the third question, I submit, that a distinction is to be taken between an acceptance qualified as to time, and an acceptance qualified as to place. If C. take from B. an acceptance qualified as to time, giving B. a longer time for payment of the bill than the bill itself specifies, I consider it as quite clear that C. could not sue A. upon the bill. The holder of a bill has no right to give the drawer time. If he do, he does it at his peril. *English v. Darley*, 2 B. and P. 61, establishes, that indulgence to the acceptor *after the bill is dishonoured*, discharges the drawer and endorsers, and there are many other cases to the same effect: if so, indulgence to him before the bill is due must have the same effect. An acceptance qualified as to place, will, or will not, take away from C. the right to maintain an action against A.

upon the bill, according as such acceptance does, or does not, throw upon A. an additional burden, or cast upon him any prejudice. If the bill be payable at a place where the drawee lives, his house is *prima facie* the place at which it is to be paid, but the usage of merchants warrants the drawee in naming any other house *at the same place* for payment. If the drawee has no house at the place where the bill is made payable, the holder has a right to require from him an acceptance specifying some house in particular in that place, for its presentment. This doctrine is laid down by HOLT, C. J., in the case cited by my brother HOLROYD, Id. Raym. 575. But, if naming a particular house casts upon the drawer any new burden or prejudice, the holder, by allowing such house to be named, has done, as to him, what he was not warranted in doing, and the drawer is discharged. The question, then, is, does the qualification as to place cast on the drawer a new burden or prejudice? and, if it obliges him to prove at his peril, in an action against the acceptor, what upon a general acceptance he would not be bound to prove, it does cast upon him a new burden.

In answer to the fourth question, I am of opinion, that C. would not be at liberty to maintain an action against A. on his original debt, without delivering to A. the bill so accepted; because A. has by the bill offered to C. a credit upon B., and C. has consented to that credit: and C. has no right to double payment from A. and B. *Kearslake v. *Morgan*, 5 T. R. 513, is an authority [**245] in point, to show, that, if a debtor pay his creditor, by a note or bill, which the creditor takes on account of his debt; such taking of a bill will be an answer to an action brought by the creditor against his debtor for that debt, unless the creditor gives up such bill.

Wood, B. In answer to the first question proposed by your lordships, I am of opinion, that, in this case, the bill of exchange mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, "payable at Sir John Perring's and Co., bankers, London," that is to say, at the house of certain persons using in trade and commerce the name, style, and firm of Sir John Perring and Co., bankers, London, the holder was bound to present it at that house for payment, and to aver in his declaration that the same was presented at that house for payment.

It is clear, that the drawee of a bill of exchange, if he choose to accept it, may do it generally, or may make a special or qualified acceptance. The holder may refuse to take a special or qualified acceptance; but, if he do take it, he is bound by it, as that constitutes the contract between him and the acceptor. There are many cases which might be cited to prove this position, but I will only trouble your lordships with one. In *Petit v. Benson*, Comb. 452, a bill was drawn upon the defendant, who accepted it by endorsement, in this manner, "I do accept this bill, to be paid half in money and half in bills;" and the question was, whether there could be a qualification of an acceptance, for it was alleged that his writing upon the bill was sufficient to charge him with the whole sum: so that the question here must have been, whether the words "to be paid half in money and half in bills" would not be rejected, and the acceptance stand as a general acceptance? "But 'twas proved by divers merchants, that the custom among them was quite otherwise; and that *there might be* a qualification of an acceptance; for he that may refuse the bill totally, may accept it in part. But he, to whom the bill is due, may refuse such acceptance, and protest it, so as to charge the first drawer; and, though there be an acceptance, yet, after *that, he hath the same liberty of charging the first drawer as he before had :" that is, although there be an acceptance written, if he refuses to [**246] take it, he may strike it out and charge the first drawer. It is observable that the case says, the custom was proved by several merchants: at that time, it was usual to set out the custom of merchants in the declaration, and to prove it by witnesses, which accounts for the words "'twas proved by divers merchants;"

but it was afterwards, in the same reign, W. 3, held, that the court was bound to take judicial notice of the law merchant ; and, therefore, it is not usual now to set out the custom, but to allege that, according to the custom of merchants, such an one drew a bill, and such an one, according to the custom of merchants, accepted, &c.

As there may be a qualified acceptance, is the acceptance in question a qualified acceptance ? What makes a qualified acceptance ? Why, the words used by the party in his acceptance. Do the words "payable at Sir John Perring's and Co., bankers, London," mean nothing ? Are they mere surplusage ? If so, then this bill ought to have been presented for payment at Torpoint. To make such constructions would, I conceive, be contrary to the usage of merchants, and the plain sense and meaning of words. Acceptance imports a promise ; and the acceptance in question is a promise to pay at a particular place, that is to say, at a banker's in London. An acceptance is an *actual promise* to pay, (per *Curiam*, in *Mitford v. Walcot*, 12 Mod. 410.) There are two conflicting decisions of the Courts of King's Bench and Common Bench upon the point in question, viz. the case of *Fenton v. Goundry*, in K. B., and the case of *Gammom v. Schmoll*, determined by the Court of C. B. On those cases I will not trouble your lordships with my comments : but I must observe, that there is a very material case of *Saunderson v. Bowes*, which, though my brother BAYLEY does not seem *now* to think so, I hold to be good law. In that case, a promissory note was made payable at a banking-house, and the court held presentation at the banking-house a condition precedent to the maintenance of the action. I cannot distinguish the case in question, in principle, from this of *Saunderson v. Bowes*, where the defendant promised **to pay at the banking-house at Workington, to one R. Nelson or bearer*. The Court of King's Bench on demurrer held, that *it was necessary to present* the note for payment at the banking-house at Workington, which seems to me to be contrary to the former decision of that court in the case of *Fenton v. Goundry*, which was the case of a bill of exchange accepted payable at a particular banker's (like the acceptance in this case.) The distinction which the Court of K. B. took, was, that the acceptance was no part of the original conformation of the bill itself, but that the words in the note (in *Saunderson v. Bowes*) restrictive of payment at the place named, were incorporated in the *original form of the instrument* which alone created the contract and duty of the party. Try this case by that principle ; what alone creates the contract and duty of the acceptor ?—Why his acceptance. There is no antecedent debt due from the acceptor to the holder. What is incorporated in the *original form of the acceptance* ? The place of payment. It is true, that acceptance is a subsequent act to the first conformation of the bill : it is a subsequent contract between the acceptor and holder ; but, it is the only contract which there is *between them*. It is, in point of law, a promise of the acceptor to pay the bill at a specific place. The declaration states, and incorporates in the acceptance as there stated, the very words "payable at Sir John Perring's and Co., bankers," and the promise alleged is to pay according to his said acceptance. The plaintiff by his declaration does not reject these words as surplusage, but considers them as forming part of the acceptance. Suppose, instead of a note, a bill had been drawn on Bowes and Co., and they had accepted it payable at their banking-house at Workington, and subscribed the acceptance, can it be contended, that, in one case, the holder is bound to present at the place, and, in the other, not ? I say, therefore, as was said in *Saunderson v. Bowes*, that a demand by the holder of payment of the bill at the specific place was a condition precedent, in order to give himself a title to receive the money.

As to the second branch of the first question, viz. Whether the plaintiff is bound to aver in the declaration, that the bill was presented at the house of Perring and Co. for payment ? I take it to be a condition precedent that it

should be presented for payment at the appointed place; and, if so, without doubt, the plaintiff cannot maintain his action without averring performance of that condition precedent, and so the Court of King's Bench held in *Saunderson v. Bowes*. It is not necessary, as between the holder and acceptor, that the holder should aver presentment on the day when the bill becomes due; because the acceptor is liable at all times afterwards, whenever it shall be presented at the appointed place. His liability is not confined to any day; his liability is to pay any time after the bill becomes due, if presented at the appointed place. The presentment on a particular day can only be material to charge the drawer. It has been argued, that presentment need not be averred, but, that it is matter of defence. I think, that it may be matter of defence although not averred; and, that, at the trial, the plaintiff ought to be called on to prove it; otherwise, after verdict, it might be presumed, that it had been proved to be presented according to the acceptance. If a bill directs the payment at a certain place, it ought to be paid there without other demand than at the place, though the acceptor lives at a place remote, Com. Dig. tit. *Merchant* 200. The place where a bill is to be paid is so important, that, if it be directed to a person generally, and he will not accept it to be paid at a certain place the holder may protest it. If a bill be accepted at Amsterdam, and no house named where the payment is to be, the party need not to acquiesce in it, but may protest the bill; but, if he will acquiesce, it is well enough, 12 Mod. 410, *Milford v. Walcot*. Then, according to the doctrine contended for, although the law requires a place of payment to be named; yet, when it is named, you are not obliged to resort to it for payment. The mischief to the commercial world, and to all who have any concern with bills, would be very great, if the holder were not bound to present for payment at the appointed place; but, on the contrary, might, at once, without any presentment, bring an action against the acceptor. The acceptor would have no means of avoiding an action (and, perhaps, an arrest;) for his acceptance may have been in circulation, and may be in the hands of persons of whom he knows nothing: so that he cannot tell to whom to send or tender his money, or how he is to get discharged; and the first notice which he has of *who the holder is, may be by an action. Common sense and common justice, and the convenience of mankind, all concur in telling one, that a man, who has agreed to take an acceptance payable at a specified place, should be bound to have recourse to that place for payment before he can sue the acceptor. It has been argued, that the defendant should not have demurred, but should have pleaded, that he was ready to pay at the appointed place, but nobody came to receive payment. That, I conceive was not necessary: because the first act to be done (which is a condition precedent) is the presentment of the bill for payment at the appointed place; and the plaintiff must show that to maintain his action; and so was the determination in *Saunderson v. Bowes*. But, considering the presentment and payment to be concurrent acts, the party who brings the action (not he who defends it) must show, that he has done what is necessary on his part to maintain that action, namely, that he has been ready with his bill to present, and, thereon, to receive payment at the appointed place. In answer to the arguments raised from forms of pleading, I say, that the defendant may avail himself of this objection in different shapes; 1st, as in this case, by demurrer; 2dly, he may plead the general issue, and, for want of proof of presentment, apply for a nonsuit; or, 3dly, he may plead specially, that he was ready at the appointed place to pay, and that no presentment was made, or, generally, that the bill was never presented at the appointed place. It has been argued, that presentment for payment need not be averred, and that it never is averred in a declaration against the acceptor; and I agree, that, where the acceptance is general, it is so; and the reason is this, because the acceptor is always liable: his acceptance operates as a promise to pay, not only at the time when the bill

is due, but at all times afterwards when requested, or on demand; and tho bringing the action is in law a request or demand. But, where place is of the essence of the contract, as in the case in question, though it be not necessary, to aver presentment at the day, it is necessary to aver presentment at the place on some day before bringing the action. One who is indebted promiseth to pay it upon request: in an action upon the case upon that promise, the party [250] needs not to express the *assumpsit* *with the request, it being an old debt; but otherwise it is, where there is such a promise without any *duty precedent*, 4 Leon. 2, Pulmant's case. In debt or detinue, the very bringing of the action and demand of the writ is a demand and request, Per JONES, J., Godb., 403, Hern and Stub's case. Acceptance after the time of payment elapsed, and a promise then to pay according to the tenor of the bill, is good, and amounts to a promise to pay the money generally, 1 Salk. 129, *Mitford v. Wallicot*. Arguments have been drawn from forms of pleading in actions on bonds or obligations and other actions in debt, and it is contended that it lies on the defendant to plead either a tender or that he was ready to pay and bring the money into court. These rules are not applicable to this case: this is not an action of debt or *indebitatus assumpsit* on an antecedent debt. It is well established, that an action of debt will not lie on the acceptance of a bill of exchange, it is an action on the custom of merchants for damages only without any antecedent debt. As to debt on bonds or obligations, they create an immediate debt, and the defendant must show that he has done all that was necessary on his part to perform the condition, and that it was the fault of the obligee that it was not completed. But, when the plaintiff brings an action for a demand dependent on a condition precedent on his part to be performed, there, he must aver performance to maintain the action, as in *Saunderson v. Bowes*.

In answer to the second question proposed by your lordships, I am of opinion, that this bill having been so accepted as aforesaid, such acceptance is, in law, to be considered as a qualified acceptance to pay the same at the said house of Sir John Perring and Co., bankers, *only*; and, that it is *not* a general acceptance to pay the same with an additional engagement or direction for the payment thereof at that house, for the following reasons. It is the custom of merchants and opulent persons to keep their moneys at bankers, and to accept bills to be paid at their bankers, that they may not be under the necessity of keeping money at their own houses, or intrusting money to their servants in their absence to take up acceptances, or of carrying money about their persons [251] to answer such acceptances, if demands *should be made upon them personally. Such special acceptances are conveniences to both holder and acceptor. But this object, so far as respects the acceptor, would be totally frustrated, if, at the election of the holder, he, the holder, could reject the appointment of the place of payment in the acceptance as mere surplusage, and demand payment wherever he pleased. What authority is there either in law or common sense to say, that a promise (and an acceptance is a promise) to pay at a particular appointed place by name, is to be expanded (for that I think is the phrase) into a promise to pay in every corner of the kingdom where the acceptor may happen to be, as well as at the particular appointed place. The acceptor is under no previous obligation to pay; he owes no debt to the holder prior to his acceptance; his acceptance is the only thing which constitutes the compact between him and the holder. The expression of one particular place, according to a well known maxim, is the exclusion of any other. There is no law or custom of merchants to justify such an *expansion*, or rather I should say, *expulsion* of men's words and meanings. I remember cases of this sort. A person has given a promissory note payable at a particular time, and has signed it; and, after he has signed it so that he has completed the instrument, he has put upon the side or bottom of the note a memorandum of a particular place where it will be paid. In such a case, the particular place is no part of

the note, and does not control its general operation : it is no variance in a declaration to omit such a memorandum : it may, perhaps, amount to evidence of an additional engagement that it shall be paid at that place. But, here, the acceptance is only one single continued sentence, at the end of which, probably, stands the signature of the acceptor.

In answer to the third question proposed by your lordships, I am of opinion, that, if A. draw a bill on B. in favour of C. for 100*l.*, and C., without the previous authority or subsequent assent of A., take an acceptance of the bill for the whole of the 100*l.*, but an acceptance qualified as to the time or place of payment, C. could, notwithstanding such acceptance, maintain an action upon the bill against A., unless the qualification as to time or place produces a damage or injury to A., for the following reasons. If the holder, without such previous authority or subsequent assent of A. *the drawer, enlarge the time of [*252] payment by the acceptor, that may injure the drawer and operate to discharge him ; or, if he take an acceptance payable at a distant place, so that, if the bill be dishonoured, notice cannot be given to the drawer so soon as it might if the acceptance had been general, that may injure the drawer and discharge him as for want of due notice. But, in the case of a bill drawn on a person in London, and accepted payable at a banker's in London, I should think such special acceptance would not operate to discharge the drawer, if due notice was given to the drawer of the non-payment, because, in such a case, the special acceptance does the drawer no injury.

In answer to the fourth question proposed by your lordships, I am of opinion, that, if A. were debtor to C. in 100*l.* previous to his so drawing upon B. in favour of C. to the amount of 100*l.*, C. could not, upon A.'s refusing his assent to an acceptance qualified as mentioned in the above question, maintain an action upon the original debt against A., without delivering to A. the bill so accepted ; in case, at the time the bill was drawn, B. was also indebted to A. in a like sum of 100*l.* Lest I should have mistaken this question, I will take the liberty of offering some reasons or explanations. If C. take the draft of A. upon B. for a debt due from A. to C., C. is bound to use his endeavour to get it accepted and paid, and, if it be not honoured, is bound to return it to A. in due time, and to deliver it up to A., and, that being done, it is the same, then, as if no bill or draft had been given ; and C. may then maintain his action against A. for his original debt. If the bill have been left for acceptance, and B. have written a qualified acceptance upon it, which C. does not choose to take, he should inform B. that he will not take an acceptance so qualified, and require a general acceptance ; and, if that be refused, he should strike out what was written, and return the bill to A. as an unaccepted bill, in which case, C. may resort to his original debt against A. If C., without A.'s previous authority or subsequent assent, accepts and assents to B.'s acceptance, so qualified as to time or place as materially to alter the condition of the drawer, in that case, he can only resort to B., the acceptor, according to the terms of his acceptance, and A. will be discharged from his debt to C., for which he gave the bill ; and B. will be *discharged, as against A., from his original debt, [*253] for which he gave his acceptance, and can only be sued on his special acceptance.

GRAHAM. B. The general question proposed by your lordships is, whether the words of this acceptance form a condition precedent, and whether such expressions constitute a qualified acceptance, or a general acceptance with an additional engagement or direction for payment at the house mentioned. If these words do constitute a condition precedent, it was necessary before action brought to demand payment at the place mentioned, and to aver in the declaration that the plaintiff had so done. When a man accepts a bill, it is the most solemn, because it is the most public recognition of the drawer's right to demand the amount of it from him. The acceptance is an obligation to pay all

over the world, and the question is, whether generally speaking, in the intention of the acceptor and the understanding of the holder, the words "payable at Sir J. Perring's and Co., contract this general obligation to an engagement that the acceptor will pay the drawer there and no where else, (as some seem to think,) or, at least, not till it be proved that a demand was made there in vain. In my apprehension, such an acceptance is no qualification of the general liability of the acceptor. It is a substitution of the banker's for the person and abode of the acceptor, for mutual convenience; and means only to charge the drawer and endorsers *in transitu*, that the holder, instead of calling upon the acceptor, should make his demand at the banker's. No demand is necessary against the acceptor, he is liable without demand; but, to charge the drawer, you must prove a demand on the acceptor, or on the persons whom he has identified with himself for that purpose. The question, then, will be, does a man mean to impose a condition, or to suggest, for mutual convenience, a place, where, with least trouble to both, the money may be had? But this question, of daily occurrence, simple as it may seem and of easy solution to some, is rendered complicated and difficult by great and conflicting authorities.

As to the balance of authority, I think it cannot be doubted, from the case of *Smith v. De la Fontaine*, in *1785, what Lord MANSFIELD's opinion *254] was. His great experience and knowledge of mercantile transactions and high character, carry with them strong evidence of the prevailing opinion. *Saunderson and others v. Judge*, 2 H. B. 509, in 1795, was an action on a promissory note (and, for the present, I make no distinction between notes and bills) against the endorser. Sharp the maker, promised to pay to Wilkinson or order; and, at the foot of the note, there was a memorandum, that he would pay it at the house of Saunderson and Co., with whom he had a cash account. Wilkinson endorsed to Judge, he to Sanders and Co., and they to Saunderson and Co. Sharp, before the note became due, absconded, and Saunderson wrote by the post to Judge, giving him notice of the non-payment. The declaration was in the general form, without stating the memorandum or any thing tantamount to an application to the plaintiffs. At the trial, the plaintiffs were nonsuited, as they had not proved an actual demand on the maker; and the language of the court, consisting of EYRE, C. J., HEATH, BULLER, and ROOKE, Judges, after the argument upon the motion for a new trial, forms the foundation of my opinion. They said, "It was no part of the contract that the note should be paid at the house of Saunderson and Co., and, therefore, that was not necessary to be stated in the declaration: the maker merely appointed the house of his banker as the place where he was to be called upon for payment. It is not necessary that a demand should be personal; it is sufficient if it is made at the house of the maker, and it is the same thing in effect, if it be made at the place where he appoints; and as the demand was to be made at the house of the plaintiffs themselves, it was sufficient for them to turn to their books." But, it may be said, this was the case of a detached memorandum. I will say a few words on the subject of the supposed difference between such a memorandum at the bottom of a note, and an acceptance of a bill of exchange payable at a particular place. The case of *Lyon v. Sundius*, 1 Campb. 423, was an action by the endorsee of a bill of exchange against the acceptor; the declaration stated only a general acceptance. It was precisely this case, the acceptance being "payable at Messrs. Hankey and Co's." The very same objection was *taken by Mr. Park, and I am free to say, that the words of *255] Lord ELLENBOROUGH carry conviction to my mind, and form the foundation of my opinion. "How can you make the words *payable* at Hankey and Co.'s more than a mere memorandum? The acceptor of a bill of exchange is liable universally. This very point was brought before the court some time ago," (alluding probably to *Saunderson v. Judge*, of which Mr Park said he had some impressions on his mind,) "when," says Lord ELLENBOROUGH,

"the judges were all of opinion that such words formed no part of the contract, and did not require to be set out in the declaration. It is difficult to believe, I had almost said impossible, that the case should have rested there, if that had not been the opinion of all the judges of the King's Bench; and, as proof, in the very next year, (1809,) at the Hilary term sittings, Mr. Justice BAYLEY held, in the case of a promissory note, *Wild v. Rennards*, 1 Campb. 425, 'that, in an action against the maker, there was no necessity to prove that it was presented where payable. These authorities are followed by the decision in *Fenton v. Goundry*, on the fullest consideration of *Callaghan v. Aylett*, then lately determined in the Common Pleas. I cannot help adding the two decisions at *nisi prius* of Lord Chief Justice GIBBS, *Head v. Sewell*; *Richards v. Millington*, Holt, N. P. C., 363, 364; these, together with the common form of declarations, make a weight of authority, which it is difficult to counterpoise.

But, it is said, in order to diminish the weight of these authorities, that the Court of King's Bench have not always been consistent. And first, it is said, that, in *Parker v. Gordon*, 7 East, 386, they have recognised the propriety of an application at the place of payment. But that was an action against the *drawer*; and it is universally true, that to charge the drawer, you must prove a demand on, and refusal by, the acceptor or his substitute. If, therefore, he says, "I accept payable at my banker's," he says, "it is there I am to be called upon for payment; that is my house, there it is where I am to be found, and I authorize you to consider me as personally present there for the purpose of payment;" and, if so, the holder may be presumed to know the banking hours. *And, if the holder were not bound to this, he should have gone as, Lord ELLENBOUGH says, in *Parker v. Gordon*, 7 East, 386, "a step further," and proved a demand on the acceptor, for, otherwise, no demand is made on the acceptor. Secondly, it is said, that they have impaired, if not contradicted, the case of *Fenton v. Goundry*, by that of *Saunderson v. Bowes*: this argument or assertion is founded on the supposed perfect analogy between bills of exchange and promissory notes. I perfectly agree, that, in some cases, place may be essential, and may be rendered so by the terms and occasion of the acceptance. A case may be put, of a man, who remitting all his property to England, and taking his departure from India, accepts a bill for 5,000*l.* at six months, payable in London: he loses his passage: it could never be said, in such a case, that the acceptor engaged to pay in India, or at the Cape of Good Hope, on his way home. The case of bankers issuing notes payable at their banks, as in *Saunderson v. Bowes*, may be one of these cases; but I deny the alleged analogy between bills of exchange and promissory notes. The maker of a promissory note may express his own terms. He is, as it were, drawer and acceptor; the note must be taken as he issues it. But, in the case of bills of exchange, the drawer has a right to an unqualified acceptance, and an endorser *in transitu* is entitled to the same right. If these acceptances were construed as special, and as qualifying the general liability of the acceptor, who is bound to pay, it would hurt the credit of bills. The acceptor is the person whose credit principally supports the bill: he is considered as always liable; but, if an accidental or careless omission to call at the place appointed destroy the acceptance of the bill, the confidence attached to the acceptance is gone, and the credit depends on the punctual observance of the terms of the condition. The proof of a demand and refusal is not easy, and, in many cases, might fail, or be brought in doubt by contradictory evidence. The case of *Saunderson v. Bowes*, then, can hardly be said to be impugned by that of *Fenton v. Goundry*. At all events, the former case may be considered as wanting the weight of the latter; but, it is sufficient to distinguish them by the difference of the subject matter of each case. It is, thirdly, said, this is an order on *the banker: I grant, that it is an authority to the banker to pay, and, in effect, an order; but we must not, by refinement, stagger prevailing notions. If it be an order on the banker, *Bishop v. Chitty* is a dan-

gerous precedent: no man of business ever thought that such a note or memorandum converted the bill of exchange into an order on the banker; and, that by not calling at the banker's, he lost the benefit of his acceptance, and took the credit of the banker in the place of the acceptor. As to the cases in the Common Pleas, I shall not oppose to the case of *Ambrose v. Hopwood*, 2 Taunt. 61, that of *Huffman v. Ellis*, M. 51 G. 3, K. B.,(a) in the King's Bench, and House of Lords; in the latter, the declaration followed the case in the Common Pleas, and the words, according to the tenor, might include the house. In *Callaghan v. Aylett*, and *Gammon v. Schmoll*, is to be found the great counterpoise to the authority of the Court of King's Bench; but, I must say, that the reasons given are not such as belonged to the authority of the judges, who are reported to have given them. In *Callaghan v. Aylett*, Mr. Justice HEATH says, "there can be no difference in this respect between an action against the drawer, and an action against the acceptor." But, there is this difference, when the acceptor accepts "payable at the house," he means to limit his ubiquity by saying, that he is to be found there for the purpose of payment; and if the holder do not seek him there, he makes default in calling on the acceptor. If, without such direction, the holder omit to call at the house of the acceptor, he cannot, on account of that omission, charge the drawer or endorsers: but it is too much to say, that, by that omission, he discharges the acceptor, who is at all times liable, though no demand of payment was ever made, even at his house. Mr. Justice HEATH avoids the authority of *Saunderson v. Judge*, by saying that, there "it was a memorandum at the foot of the note, not a part of the instrument." That leads to nice, I had almost said, frivolous, distinctions; for, according to that doctrine, if I say, "I accept, R. G." and add at the foot of the bill, "payable at Messrs. G. and Co.", it is a mere memorandum; but, if I say, "I accept, payable at Messrs. G. and Co.", it is embodied in my acceptance, and forms a *condition precedent. Does it make a difference, [258] that, in one case, the acceptance is all in one tenor, as "I accept, R. G. payable at my banker's," and that, in the other, I write, "I accept, R. G." and, underneath, "payable at my banker's?" A man, whether he accepts in the former or latter form, means the same thing; for when he writes the words "payable," &c. he is usually determined in what place to write, by the room or vacancy on the paper: are the minds of men in business to be harassed with such untenable and inseparable distinctions? In *Gammon v. Schmoll*, Mr. Justice CHAMBRE puts the case of a bill drawn upon a judge just going the circuit. I dare say, it has happened to him as it has happened to me. But, can it be supposed, that any man of character on such or like occasion would make his bill so payable, if he had not cash or credit at his banker's? And who would refuse to call at the banker's? No holder in his senses would forbear to follow the directions of the acceptor, because it is undoubtedly done for his convenience; no man in his senses would refuse an application to the banker of the judge, where he would be sure of his money, for the gratification of coming down to Exeter for the sake of arresting him: but, if it turn out that an acceptance, payable at a particular place, is a mere shift, or act of robbery, it would be idle, and, in some instances, (as in directions to obscure corners and streets,) almost impossible, to attempt to find out a sneaking lodger in a garret to satisfy this indispensable condition. What holder, or what attorney, would arrest a man of credit under such circumstances, or would disgrace a judge? Such acceptances will always give credit to bills; and the practice will continue, though your lordships should decide that they do not qualify the general liability of an acceptor; and, perhaps, the mercantile world will thank your lordships for not imposing upon them the knowledge of precedent conditions, or a speculation, as to the different positions on a note, by the occupa-

(a) See Bayley on Bills, 98, n. 1, 3d ed.

tion of which the words "payable at," &c., become either a mere memorandum, or a condition precedent. But cases might be put of vexation; these may all be met by way of defence. It is said, (1 Rolle's Abridgment, 444;) and I take it to be law, "If the condition of an obligation be to pay 10*l.* at a given day at S., he (the obligor) is not bound to pay in any other place;" and so "in that case the obligee is not bound to receive it in any other place;" and so Coke, Littleton, 211, "For, if the obligor then (that is, when by notice the obligor has fixed the place) and there tenders the money, he shall save the penalty of the bond for ever." But he saves only the penalty and costs; he must pay the debt. An acceptance is, by the custom of merchants, a debt; though, independently of that custom, neither debt nor assump-
tion would lie, for want of consideration. But, in all these cases, the fulfilment of the condition comes by way of defence. The obligee is not bound in the outset to state his demand at the place; the defendant must plead his performance of the condition, and, proving it, he is quit of the damages and penalty; but he must bring the money into court. Place may, undoubtedly, be essential; and here both obligor and obligee understand each other that so it is to be considered.

In answer to your lordships' third question, I am of opinion, that, if the holder of a bill for acceptance take an acceptance, varying in time or place of payment, where place creates inconvenience, and obstructs or impedes the circulation of the bill, or, when new terms or conditions are introduced, he makes it his own. This is obvious in the case of enlargement of time. So, if the acceptance be payable at Paris, Dublin, or Edinburgh, where the place is evidently made a condition of the payment; in such a case, I think that the drawee would be discharged.

In answer to your lordships' fourth question, I am of opinion, that, if, in the case put, C. take an acceptance, materially qualified as to time or place, and A. dissent, and C. still keep the bill, he makes it his own, and cannot sue A. on his original debt: but, if C. give timely notice to A., and immediately offer to return the bill to A., I think his original cause of action would remain.

Once settle the uniformity of practice, and the evil is over. But, according to the law as laid down by the Court of King's Bench, you have a plain simple declaration and proof. According to the law laid down by the Court of Common Pleas, you have a new form of declaration, and a proof which, in many instances, may be difficult, and may lead to controversy and contradiction.

*RICHARDS, C. B., in answer to the first question, expressed his opinion, that the holder of the bill in the present case was not bound to present it at Sir J. Perring's and Co. for payment, nor to aver presentment there. [260]

To the second, that the acceptance of the bill in question was not a qualified acceptance, constituting an undertaking to pay the bill at the house of Sir J. P. and Co., but a general acceptance, constituting an undertaking to pay the same, every where, with an additional engagement or direction for the payment thereof at that house.

To the third, that, if the payee C. were, without the previous authority or subsequent assent of the drawer A., to take an acceptance qualified as to time or place, by taking such an acceptance he would discharge the drawer A.

To the fourth, that, if A. were to refuse his assent to such a qualified acceptance, C., having received the bill for the debt of 100*l.* due from A., could not sue A. for the debt till he had redelivered the bill to A.

DALLAS, C. J. With respect to the first of your lordships' questions, namely, whether, in this case, the bill of exchange mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage of merchants, payable at the banking-house of Sir John Perring and Co., the holder was bound to present it at the house for payment, and to aver in the

declaration that the same was presented there, I am of opinion, that the holder was bound to present it there, and so to aver in the declaration.

And, as to the second question, I think that the bill, having been so accepted is, in law, to be considered as a conditional acceptance; and not as a general acceptance to pay, with an additional engagement or direction for payment at the house mentioned. And as the case, which has given occasion to your lordships' questions, has arisen from contradictory decisions in the courts below, and as, in the recent cases, all that could be found of former decision has been brought under the consideration of the respective courts, and their disagreement in opinion has still continued, and continues, (as appears from the answers hitherto given *to your lordships' questions,) it is obvious, that the present is a case which can very little depend upon mere authorities; the authorities have, however, been already fully referred to, and my reasons will, therefore, chiefly and shortly be given upon general grounds. And, first, I admit the presumption of law to be, (though, in the present state of commerce the fact is frequently otherwise,) that the drawing a bill of exchange presupposes an antecedent debt, and the acceptance is an admission, that such a debt is due. And, so considered, it is, no doubt, clear, that, the debtor may be called upon to pay without reference to time or place. But, if, in the bill itself, the drawer were to name a particular place for payment, instead of such place being specified in the acceptance only, such bill would be a bill qualified as to payment both with respect to time and place. And, the acceptance being according to the tenor of the bill, the acceptor, as to payment, would be bound accordingly. This, I am aware, would be the act of the drawer himself, and, therefore, not falling within part of the reasoning, as it applies to the acceptor, a distinction, to which I shall, hereafter, advert more fully. It is, I apprehend, equally clear, that, by a bill drawn generally, the drawer transfers his rights against the drawee, as modified by the bill, to the extent of the bill; and, that the drawer may enter into any contract with the payee, which the drawer might have done with the drawee before such transfer made, not affecting, thereby, in substance, the rights of the drawee. I assume, therefore, for the present, that, if the bill had purported to be an order to pay at the house of Perring and Co., and the acceptor had accepted such bill, he would not have been bound to pay elsewhere, till application for payment there, had been made and failed. I shall endeavour to show, hereafter, that what the drawer may do by the bill, as between him and the drawee, as between the acceptor and the payee, may be done by the acceptance. To take, first, the case of the drawer of the bill: he may draw it in any form which he thinks fit, provided the form be such as is warranted by the usage of merchants, without which it will not be a bill of exchange; but, it will be scarcely be contended, that drawing it restrictive as to place of payment would be a violation of such usage. A bill general *and absolute in the first instance drawn and accepted generally, operates according to the terms of the bill; and the bill itself need only to be looked to, the acceptance referring to and not varying from the bill. But, to a bill so drawn, the drawee may refuse acceptance; and he may propose to accept conditionally, the payee being at liberty to receive or refuse such conditional acceptance; if he refuse, he must go back to the drawer, who will have his remedy against the drawee, and in this, the first and most simple view of the subject, the bill itself is at an end.

Suppose, however, the case of a partial and qualified or conditional acceptance; and, that an acceptance may be such in many respects, has been admitted by all the learned judges in succession: indeed the very questions put by your lordships recognise the distinction and adapt themselves to it. What, then, is meant by conditional acceptance, or in what respects may an acceptance be conditional? It may be so as to time, as to sum, as to place, as to mode of payment. It will be sufficient to refer to the authorities which have been cited as

to each of these shortly, and one will be sufficient under each head; and I mention them, not because the point itself is doubtful, but for what is said in each case. And, first, as to amount. A foreign bill was drawn upon the defendant, and he accepted it to pay a 100*l.*, part thereof; he was sued on the acceptance, and, on demurrer, insisted, *that a partial acceptance was not good within the custom of merchants*; but the court held otherwise, and judgment was given for the plaintiff, *Wegerstoffe v. Keene*, Str. 214. Next as to time. A bill was drawn and no time fixed for its payment; it was presented on the 18th of April, and accepted payable the 8th of September; this being stated in the declaration, the defendant demurred, and insisted, that, as no time was prescribed for payment, the bill was payable at sight, and that a promise to pay two or three months after sight was not an acceptance within the custom of merchants; but the court held that it was an acceptance within the custom, and the demurrer was over-ruled, *Walker v. Attwood*, 11 Mod. 190. Thirdly, as to place. On this point, also, there are numerous authorities; but, as it is, in this respect, that the present *controversy has arisen, I assume only, at present, that [*263] this also may be conditional, reserving myself to examine the authorities and doctrine hereafter. Lastly, as to mode of payment. A bill was accepted to be paid half in money and half in bills, and the question was, whether there could be a qualification of an acceptance? And it was proved by diverse merchants that there might be, for that he, who might refuse the bill totally, might accept it in part; but, that the holder was not bound to acquiesce in such acceptance, *Petit v. Benson*, Comb. 452. If, then, there may be a conditional acceptance as to sum, as to time, and as to mode of payment, such acceptance, as to these, qualifying the liability to pay, it is difficult to conceive why there should be any difference as to place, at least as between the acceptor and the payee so taking the conditional acceptance; nor do I conceive, speaking with deference to other opinions, that there is any distinction which, upon principle, can be supported. Losing sight of place, however, for the moment, let the effect of a conditional acceptance be examined in the other respects already mentioned. And great as to amount; he who takes an acceptance for less than the sum expressed in the bill, cannot claim from the acceptor more; though, as to the drawer, how it may affect him will form matter of distinct consideration. So, as to time, the holder is likewise bound by the terms under which he has consented to take the acceptance: and why? Because, on the one hand, the payee not being bound to take an acceptance except according to the tenor of the bill, and, on the other hand, the acceptor being only bound to accept as he may chose to accept, when the acceptance varies from the tenor of the bill, and the payee, notwithstanding, takes such acceptance, he consents to take the bill according to the tenor of the acceptance, and not according to the tenor of the bill.

So it is as to sum, as to time, as to mode of payment; in each of which cases, the acceptance, it is admitted, forms the contract between the immediate parties. Is there, then, any difference in this respect, as to place, and as to place only? In the argument at the bar, (and herein the case seems to me now narrowed to a single point,) it has not been disputed, that there may be a conditional acceptance *as to place, restrictive of payment, and [*264] making presentment necessary at such place, provided it be by words of express and unequivocal import; but it is denied, that to make a bill payable at one place, is an exclusion of others; and in *Fenton v. Goudry*, I observe, Mr. Justice HOLROYD, who there argued against the restricted liability, seems to have taken the same distinction. "The case has been argued (he said) as if the terms of the acceptance had been payable at Sikes and Co.'s *only*," not contending, that if so drawn, the payment would not have been restricted; and Lord ELLENBOROUGH is made immediately to observe, "Is it more than an expansion of the promise?" An observation, which his lordship could not have made, if, by the word *only*, the promise had been, in terms, restricted; and, in

the same way, in the case of *Gammon v. Schmoll*, in the Court of Common Pleas, it was not denied at the bar, that, if the acceptance had been at the place named, and not elsewhere, in such case the acceptance would have been clearly qualified, and conditional and restricted as to place. And so, yesterday, it was admitted by my brother HOLROYD, and so, to day, it was admitted by my lord chief baron.(a) The question, therefore, in this view of the subject, comes round to be merely a question of construction, namely, what do the words of acceptance import in the particular instance? and are they conditional as to place of payment or not? There are no technical words, by which, generally speaking, a condition must be created; and, whether it be a condition precedent, a concurrent act, or a mutual promise, must be collected from the intention of the parties, reference being had to the words made use of, and the subject matter in question. And so again, it has been admitted by both the learned judges to whom I have last referred. "Intention (said my brother HOLROYD, in express terms) is that which ought to govern." "What did the parties mean?" (said my lord chief baron.) Now conditional or qualified, as opposed to absolute, I can only say, imports some qualification or restriction of that, which would be otherwise unconditional. This is self-evident, it will be agreed, when [265] the condition is established; but so to "state it, it is said, is but begging the question, or leaving it at least where it was before, the question being, whether the words operate by way of condition, and not upon the effect of the condition when established. Still, however, I can only say, the very departure from generality of expression to me, imports some modification of that generality; and, if simple and absolute acceptance have a clear and simple operation, and will bind a party to pay wherever his acceptance may be presented, it seems to me but reasonable to intend, that, when he accepts, payable at a particular place, he means to exclude, in the first instance, a liability to demand in any other place. And, looking to intention, and taking as admitted, that it ought to govern, I cannot permit myself to doubt, that the words made use of in this instance are, in fairness of construction, just as clear as if express words of restriction had been introduced. The maxim referred to from Lord BACON, by my brother HOLROYD, (I speak it with deference) appears to me too technical as applied to such an instrument as a bill of exchange; nor would it govern in another view; for, in a promissory note, it is agreed, that express words of restriction are not necessary; words of appointment and specification being of themselves sufficient. In none of these is the word "only" to be found, nor any words beyond those which belong to this particular case; and yet, the rule of construction, as mere construction, must, in each instance, be the same. I think this upon the mere ground of the words themselves, but I think so, still more strongly, on the sense and reason of the thing. I will, first, put the case of a bill accepted payable in a town different from that, in which the abode of the acceptor may be, as for instance, and to avoid extreme cases, a bill accepted in Birmingham payable in London; and I will, farther, suppose it to be a bill, according to the original simplicity of such transactions, that is, for an antecedent debt from the acceptor to the drawer of the bill. By his acceptance payable in London, the acceptor promises to have a fund in London, when the bill shall be presented; he may have sufficient to pay the bill, but not beyond it, and yet, according to the argument which would reject the words of specification as words of limitation, he must have that which he may not possess, that is, a double sum or sums, one forthcoming in London, and another. [266] "in Birmingham, to take his chance as to the place where, in fact, the bill may be presented when due; or be left exposed to an arrest, as the immediate consequence of non-payment. I am aware, it may be said, that such would be his situation under the original debt to the drawer, and that such

(a) Two days (the 6th and 7th July,) were occupied by the learned judges in giving their opinions.

would continue to be his situation under a general acceptance ; but it is for the express purpose of guarding against this, and on other grounds of personal and commercial convenience, to which I shall presently advert, that the practice has obtained of partial and qualified acceptance as to place, and to which, as between the immediate parties, I do not see any possible objection. It has been very properly said, in one of the cases cited at the bar, the convenience of the thing is generally in support of such qualification ; most persons keep their money at their banker's, and make all their payments there ; there, they, or their appointed agents for this purpose, are to be found, and there, if any where, is the fund out of which the payment is to be made. To this it may be added, that the very prevalence of the practice proves the convenience ; and though I will admit, that mere concurrence is not to make the law, yet, in all commercial transactions, it is greatly to be regarded, as the footing and foundation on which men deal together ; and the course of such dealing, as between merchants, is often that which of itself constitutes the law. It is scarcely necessary to refer to the stronger cases of a bill accepted in London payable in Dublin or Edinburgh, or a bill accepted in the West Indies payable in London. And suppose that, in this latter case, the party accepting has remitted to his correspondent in London the produce of his plantation, for the express purpose of meeting the bill, will it be said, that, notwithstanding, he may still be arrested in the West Indies, because, for the original debt, he was liable to be arrested any where ? And yet the argument which treats as of no effect specification or place of payment, stops nothing short of this extent. Nor do I see, in any one respect, where the line is to be drawn or the distinction to be made. If, then, it would be so in the instance of a bill accepted in one town payable in another, or in one country payable in another, let the case be considered of a bill, the parties living in the same place, and accepted payable at a particular banking-house. It is scarcely *necessary to say, that to the holder it can be no inconvenience to present it there ; but on the other hand, I admit it would be [**267] scarcely any inconvenience to the acceptor to have it presented at his counting-house, or place of abode ; for, even if it were an absolute acceptance, it would still, according to all probability, be paid by a draft on his banker, the acceptance on the bill only operating as such order ; but, even in this view, it weighs something, though possibly not much, that this would be to subject the payment of a bill to a double instead of a single operation, namely, the having two places to apply to instead of one ; and, though this would be an inconvenience imposed upon the holder by himself, still that which is not in the natural course of dealing, raises a presumption that such departure from it was not meant. And what would be thought of the conduct of a holder, who, having a bill payable at a banker's, instead of going there, should go to the house of the acceptor merely to get his draft for the bill, or should, further, insist on a specific payment in money or bank notes ?

To wind up, therefore, what I have to observe upon this part of the subject, on the reason and fitness of the thing, on principles of justice and mercantile convenience, and from the very nature of such transactions, I think it a particular place of payment, being part of the acceptance of the bill, imposes upon the holder, because he is the willing holder of such acceptance, the necessity of presenting it, in the first instance, there ; and leaves the acceptor only liable to pay, where he has provided and fixed a fund for payment, and has consented to pay, in order that he may not be called upon to pay where he has no such fund, nor given any such consent. Nor can I quit this part of the subject without adding, that I do not see a possible inconvenience which can result from so deciding ; for the holder need not take a bill so accepted ; and where the remedy is so obvious, and it turns simply on such a point, except that confusion in this respect has crept into the subject by disagreement in the decisions of courts of law, and that it is fit the law should be settled and uni-

form, the question seems to me hardly worthy of the attention which it has excited, and the consideration which it has undergone.

Deeming, then, presentment at the appointed place to be a condition precedent, *268] I will only further say, that I think "it necessary that such presentment should be averred and proved; and, that non-presentment and having funds ought not to come by way of defence, as, in the case of promissory notes, has been decided by all the courts in Westminster Hall, and from which, notwithstanding what I have heard this day, I do not myself feel disposed to dissent. Presentment, according to Lord ELLENBOROUGH, in *Saunderson v. Bowes*, at the appointed place, is a condition precedent; and for want of such an averment, the declaration is bad. The argument, therefore, as to this point, resolves itself into the question, whether condition precedent or not? For, admit it to be so, then, in this respect, there is no difference between the two courts, and the cases of promissory notes apply to bills of exchange; while, on the other hand, if it be not a condition precedent, it is, of course, not necessary to be averred.

Quitting now the general ground, I come next to the analogies which result from other cases mentioned, if not of the same, yet of a similar description. And first as to promissory notes: it is scarcely necessary to advert to what has been said as to the similarity, or the distinction between promissory notes and bills of exchange. In some respects, undoubtedly, they are different, in others it may almost be said they run into each other. A bill has, indeed, generally, three parties, the drawer, the drawee, (if accepting, becoming the acceptor,) and the payee; but there may be only two parties, as where a person draws a bill on another payable to his own order, and this, in legal operation, is rather a promissory note than a bill. It is usual, however, to declare on it as a bill; not admitting the identity of drawer and drawee; and, if accepted, the defendant may be charged in one count as the drawer, in another as endorser, and in the third, as the maker of a promissory note. I forbear to allude to the cases, which turned upon the distinction, in the address of the note, between "at" and "to," in one of which it was said by Lord ELLENBOROUGH, in *Shuttleworth v. Stephens*, 1 Camph. 407,—"This is properly declared on as a bill of exchange, though it might have been treated as a promissory note, at the option of the holder;" and, in *another of which, *Richards v. Milsington*, Holt, N. *269] P. C. 364, n., it was observed by Lord Chief Justice GIBBS, "It would be difficult to say, in most cases, that what is law, as regards bills of exchange, is not law as it respects promissory notes;" but paramount in point of application is what was said by Lord MANSFIELD in *Heylyn v. Adamson*, Burr. 669, and which has been so often mentioned, that I shall content myself with merely referring to it.

Such, then, being the similarity, and, in some instances, the identity of promissory notes and bills of exchange, let it be seen what has been determined with respect to promissory notes; premising only, that, here, at least, there is no clashing of authorities: for though the decisions in the King's Bench, as far as respects promissory notes, are denied to have application to bills of exchange, the decision in the Common Pleas, as to bills of exchange, of necessity include promissory notes; and so far, then, as concerns promissory notes, there is no difference of opinion whatever. What then has been decided respecting promissory notes? In this, the decisions of the two courts agree; namely, that a promissory note, containing in the body of it, a promise to pay at a particular place, requires a demand of payment there, in order to give the holder a cause of action if it be not paid. Now on what grounds of reasoning do such decisions stand? To take one case of the many, —in *Saunderson v. Bowes*, it is said by Lord ELLENBOROUGH, "An action on a note will not lie unless the plaintiff has demanded payment at the appointed place. And I cannot but say, that it is very convenient that such a condition should be incorporated in the note itself; for it would be very inconvenient,

that the makers of notes of this description should be liable to answer them every where, when it is notorious that they have made provision for them at a particular place, where only they engage to pay them;"—and, having thus stated the ground of convenience, his lordship added,—“then if the request at the place be a condition precedent, it should have been averred, and, for want of such an averment the declaration is bad.” Apply this doctrine to bills of exchange.—If convenience require that the makers of promissory notes should be liable only where they have expressly made provision to pay, how *is it possible, in this respect, to distinguish promissory notes from bills of [*270] exchange? Is not the convenience precisely the same in the one case as in the other?—and, being the same, how is it to depend on the form of the instrument? Call it what you will, or make it what you may, it is in payment, in each instance, that the transaction is to end, and the note or bill is the means, and nothing more, by which payment is to be procured; as far, therefore, as to a particular place of payment being pointed out, or a specific place of deposit being established, the reasoning applicable to each is precisely the same, and it seems to me impossible to distinguish between the two. An expression of Lord ELLENBOROUGH's has, however, been much observed upon, namely, “that a specification of place is but an expansion of the promise to pay.” It will not be supposed that I mean to follow any of the verbal or critical remarks which have been made in this respect, at the bar, or in the courts below. Whatever peculiarity of expression might, at times, belong to this noble and very eminent person, it was, generally speaking, a peculiarity of force adapted to his peculiar vigour and energy of thought. But, to the substance of the expression as authority, it will be necessary to advert, in order to see how it has been understood and explained by those, who have applied it in support of the doctrine of non-restricted acceptance. In *Gammon v. Schmoll*, the leading counsel at the bar, who was to support the doctrine of universal liability, explained it in this way, “every general acceptor has a double liability, he is in default, first, if the bill is presented to him, personally, wherever he may be, and he does not pay it; secondly, he is in default, if it be presented at his place of abode, and not paid: to these, by a qualified acceptance, he adds the obligation to pay it, if it be produced at the place,” that is, the place specified. He must be prepared “with triple funds to pay the bill, as well where his person is, as where his abode is, and also, at the particular place mentioned: this is what Lord ELLENBOROUGH means by an expansion of the promise.” This is a complication of expansibility which seems to me a strange departure from simplicity of proceeding; and, for myself, I can only say, I would not so understand it, if I could understand it to any other effect; but it is impossible to deny, whatever might be intended by the mode of expression itself, that in sum and substance, *it does not amount to this. But whether [*271] every man who accepts a bill of exchange, by his acceptance at a specific place undertakes to pay at every other place if required, and to have a triple instead of a double or a single fund to the amount of the bill accepted; or whether he makes his own situation worse, by making that of the holder, in one respect at least, better, that is by pointing out to him a definite place of payment, instead of leaving him to search where he, the acceptor, is to be found, when the bill becomes due, it is not for me to pronounce, but for your lordships to consider. Or why, again, this should be in the case of a bill of exchange and not of a promissory note, is that which I am not able to understand.

I now come to that, which it is said, however, makes the distinction between bills of exchange and promissory notes, so as to make the reasoning as to the latter inapplicable to the former. And this distinction is said to consist in the form and nature of the respective instruments. First then as to the *form*. In a promissory note, it is said the words are incorporated in the very body of the

instrument, which creates the contract and duty of the party ; whereas, in a bill of exchange, they are no part of the bill itself, but distinct as acceptance, and collateral to it. A promissory note is merely the promise of the maker ; the acceptance of a bill of exchange is a compliance with the order of the drawer. To a promissory note there are but two parties : to a bill of exchange there are three, and the drawer has rights as well as the acceptor and payee. And to this I agree. But here again, at least, as between the acceptor and the payee, there is no distinction. In each instance, a debt must be presupposed, and in each, it is an undertaking to pay ; it is said, that in the case of a promissory note the instrument creates the contract ; and, no doubt, it does, that is, the contract to pay in the particular manner, but not the antecedent debt ; the obligation to pay existed anterior to the note ; and, though, in the case of a bill of exchange, the debt had also pre-existence, the precise obligation to pay is created by the acceptance, and, be it promissory note, or be it bill accepted, it is, in each instance, but a promise to pay ; and, without such promise the bill itself, as to the acceptor, would be mere nullity.

To advert, however, to the situation of the drawer, (and *this brings me to the third question, which your lordships have been pleased to put,) namely, whether, if A. draws a bill upon B. in favour of C., and C., without the subsequent assent of A., takes an acceptance of the bill for the whole sum, but an acceptance qualified as to time or place of payment, C. could, notwithstanding such acceptance, maintain an action on the bill against A. And, first, with respect to time : in this the learned judges all agree, that giving time will discharge the drawer. Extending the time mentioned in the bill would be giving more time than the drawer has said by the bill he chooses to give, which, as against the drawer, the payee can have no right to do ; and, taking an acceptance at a shorter date, if, in case of non-payment, it would give an immediate action against the drawer, would, thereby, make him liable sooner than he undertook to be ; he being liable only in case of non-payment by the acceptor, and this at the end of the stipulated time. I need scarcely add, it would be the same as to place, if place, from its nature, should resolve itself into time. It remains, therefore, only to consider place as unconnected with and independent of time. And, so considered, it may, or it may not, be material to the drawer. Suppose all the parties to live in the same town, whether the bill be accepted at the counting-house, or at the banking-house, can make no real difference to the drawer ; in other cases, from distance, it might be material ; but, at all events, I think, that if it put the drawer under greater difficulties than he otherwise would be under in point of proof of proper presentment, if bringing an action himself, it is a difficulty which I hold the payee has no right to impose upon the drawer, whose rights should remain unaltered as ascertained by the bill : whether those rights were altered or not would depend on the particular case. Perhaps, however, it would be more reasonable and convenient than making it depend on situation in each particular case, which might generate innumerable questions and give rise to great uncertainty, to hold, at once, the drawer discharged, the payee having taken such acceptance without notice, and thus acting at his own peril ; and thus, all inconvenience would be guarded against, by making it necessary to give notice to the drawer.

With respect to the last question, I am of opinion, that, under the circumstances stated, C. could not maintain an *action against A. without delivering up the bill, and this for the reasons given by several of the learned judges, and which I do not feel it necessary to repeat.

In the above observations, I may appear to your lordships to have built much on the decisions as to promissory notes ; but, it has been said, these decisions themselves, perhaps, in point of law ought not to have taken place. To this I can only answer—first, that it is impossible for me to doubt of the validity of these decisions, numerous as they are, recognised and confirmed as they have

been by every court, and never, in a single instance, having till this day been drawn into doubt by even a single judge. If the law so settled is now to be considered as unsettled, I know not on what foundation, in point of law, any decision can stand: but, here, disclaiming even those decisions as decisions, and recognising only the principle on which they proceed, I say, that, if the case of a promissory note were to occur *now* for the first time, it ought to be decided as those cases have been decided; and further, that, without deriving authority from the decisions as such, the principles on which they have proceeded, and ought still to *rest*, apply equally, in my judgment, to bills of exchange. On the whole, therefore, my opinion is formed, as to bills of exchange, even without reference to the decisions as to promissory notes; and still less have I referred to the cases of promissory notes, for the purpose of proving the decisions of the Court of King's Bench inconsistent each with the other, but for the purpose of respectfully adopting the decisions of that court where they agree with the decisions of the other courts, and thus affording principles decisive, in point of law, of the same question as to bills of exchange. And here, without repeating what has been said by other judges in answer to the cases put of actions in debt on bond, or demand of rent, I will only further say, that these do not appear to me to be cases analogous to bills of exchange, which depend on peculiar and appropriate grounds of commercial law, altogether distinct and different, and which, it must be agreed, the custom and usage of merchants is to decide. And this leads me to the only point on which (independent of the different opinion entertained by several of the learned judges, and of the very able reasons by which their judgments have been supported) I am bound to say I feel some degree *of difficulty; and that is, as to what has been said of the understanding and usage of merchants with respect to the question under consideration. If qualified acceptances as to place have hitherto circulated on a settled and general understanding, that place does not operate by way of limitation as to payment, as far as concerns your lordships' first question, which points to the usage of merchants, I am bound to admit, that I ought to have answered differently; and, further, that, if so, the greatest part of my observations fall to the ground. Looking, also, to your lordships' second question, the consequence would, I apprehend, be the same, that is, as to the legal effect; for a bill of exchange, being altogether the creature of mercantile usage, recognised, however, by the law, such usage would constitute the law as applicable to such an instrument: it is not to be overlooked, that it has been asserted by high authority, that, in circulation and practice, supported by mercantile opinion and understanding, a conditional acceptance does not operate as I conceive it to do. Not meaning to doubt that such information has been given; still, if the decision is to turn on this single ground, I could wish the fact in some way or other to be regularly ascertained. I will take the law from the learned judges, whose office it is to expound the law; but, if the law is to depend on fact, and fact on testimony, I desire, if possible, to have testimony through the regular channel. This creates a difficulty with me, subject to which, I will only in conclusion add, that, for the reasons which I have given, I adhere to the answer, which I have humbly presumed to submit.

ABBOTT, C. J. In answer to the first and second questions proposed by your lordships, I am humbly to acquaint your lordships, that I think the defendant in error was not bound, in order to entitle himself to sue the plaintiff in error, who is the acceptor of the bill in question, to present the bill for payment at the banking-house of Sir John Perring and Co., nor to aver in his declaration that the bill had been so presented; for, I think, the acceptance is not to be considered in law as a qualified acceptance to pay the bill at the house of Sir John Perring and Co.; but, as a general acceptance to pay the same, with an additional *direction to the holder to call for payment at that house, instead of calling at the house of the acceptor, as he would otherwise do.

These two questions, my lords, appear to me to depend entirely upon the meaning and import of the words "payable at Sir John Perring's and Co., bankers." There can be no doubt that the drawee may qualify, because he may refuse his acceptance. The question is, whether he is to be considered as having done so by this expression? I conceive, that the true meaning and import of all phrases is to be sought in usage, rather than in a strict and literal interpretation of the words of the phrase; and, that, in mercantile instruments, the usage of trade and commerce is that to which we are to resort. Your lordships well know, that there are many words and phrases in all languages, of which the meaning varies with the subject and occasion to which they are applied. I shall take leave to postpone the delivery of the grounds of my opinion on these two questions, until after I have troubled your lordships with my opinion on your lordships' third question, and the reasons of that opinion.

My lords, I understand the expression "take an acceptance," as used in this third question, to mean consent to such an acceptance; and, so understanding it, I am of opinion, that C. could not, in the case proposed, maintain an action upon the bill against A., upon refusal of payment by the acceptor. There is not, I apprehend, any doubt or difference of opinion upon so much of this question as supposes an acceptance qualified as to time: and, in my humble opinion, a qualification as to the place of payment has the same effect as a qualification as to the time of payment.

I conceive, my lords, that, in estimation of law, all bills are to be considered as drawn for value, if not actually in the hands of the drawee at the time of drawing, (which seems to have been usually the case in the infancy of those instruments,) at least intended by the drawer, and expected by the drawee, to be placed in the hands of the latter before the maturity of the bill. And a person, who draws a bill under such circumstances, may be permitted to elect for himself the time and place of payment; because, if the drawee should refuse [276] to pay, according to such election, he would be able to sue him for the sum which constitutes the value of the bill, either immediately, if the value has been previously received, or so soon as it shall be received according to the intention upon which the bill is drawn. By an intention to place value in the hands of the drawee, I mean an intention to place it in the course of some mercantile transaction between the parties, such as the consignment of merchandise in pursuance of orders of the drawee, constituting the relation of seller and buyer; or a consignment for sale on account of the consignor, constituting the relation of principal and factor or agent; and not a mere promise to provide for the bill at maturity, by the transmission of money or other bills for that special purpose. The latter practice has, indeed, prevailed to a great extent in modern times; and bills of exchange have become rather instruments for raising money, or postponing payment of debts by a fictitious credit, than instruments of real mercantile transactions. But, notwithstanding such practice, I apprehend, they are to be considered in courts of law as founded upon real and mercantile transactions, according to their primitive object and use; because, if they are to be considered as founded upon other transactions, or to be governed by other principles, they will cease to be according to the usage and custom of merchants, upon which usage and custom alone their validity in the law of England depends; and which is referred to in every declaration in an action upon a bill of exchange; and, if the drawer of a bill has a right to elect in this manner the time and place of payment, I think it cannot be competent to any holder of the bill to substitute a new election of his own, and to consent to any variation in these particulars, without the assent of the drawer, either precedent or subsequent. The holder cannot consent to an enlarged time of payment, because, in the interval, the drawee may fail, and he cannot be allowed to enforce the drawer to prolong the credit beyond the period that he himself may have chosen, nor can he consent to abridge the time.

cause, by so doing, he will obtain an earlier recourse against the drawer, than the drawer intended to give. A bill of exchange is ordinarily addressed to the drawee at his usual place of trade or residence, and it is to such a bill that I understand your lordships' question to refer; this address, however, is intended only as a direction to the payee or holder as to the place where the drawee may be *found, in order that the bill may be presented to him for acceptance and payment; and not as a designation of a precise or definite house or place of payment. And, consequently, a general acceptance of the bill, leaves the bill according to its original tenor, and does not add any designation of the place of payment, any introduction, therefore, of a definite and precise place of payment, at which alone the presentment is to be made, is a departure from the generality of the bill; and the holder, who consents to take such an acceptance, does, by that act, consent to narrow what the drawer had left at large, and to fix a single place for the demand of that money, which, but for such his act, would be demandable by the drawer, or for his use, anywhere and every where. To such a limitation, I humbly conceive, that the drawer has a right to object, and, consequently, to say to the holder, that, by so doing, he has taken the drawee for his own special debtor, in exclusion of the drawer, or, in common speech, he has made the bill his own. I am aware, my lords, that, upon a refusal to pay at the designated place, the acceptor of the bill becomes a debtor generally; but, then, in order to enforce that general obligation, either the person who seeks to enforce it must prove the refusal; or, at least, (and which, in my opinion, is the more correct view of such a case,) the party, against whom the general obligation is sought to be enforced, may, by way of defence, allege and prove that he was ready with the money at the day and place appointed, and has at all times since been ready with it. I am aware, also, my lords, that, in the case supposed by this your lordships' third question, which is the case of a bill made payable to a person named therein, the drawer cannot sue the acceptor upon the bill, without averring and proving a presentment for payment by the holder to the acceptor, and a refusal of payment by the latter; and I am sensible, that, in many instances, it may be matter of entire indifference to the drawer, whether he shall prove a presentment for payment at the place specially designated by the acceptance, or at the place of abode or usual business of the drawee, to whom he has addressed his bill. But, though this may be a matter of indifference in many cases, it will not be so in all; if we suppose the drawee to live in some street or square in London or Westminster, and to designate another place of payment in some other street or square, in either of those cities, *the proof of a presentment at the place designated [278] may be as easy as the proof of a presentment at the place of residence or business: but, if we suppose the drawee to live at London, and to designate Salisbury or Exeter as the place of payment, or *vice versa*, the proof may not be so easy to the drawer, who may have connections in one of those cities, furnishing an opportunity of finding the witness who made the presentment, and no such connections in the other; for there is frequently no sort of connection between the drawer and ultimate holder of a bill; the latter is often a person wholly unknown to the drawer. This difference may be considered, generally, as varying, and increasing or diminishing, with the distance of the places, though not by that circumstance alone; and, if the effect of such a qualified acceptance be made to depend upon the convenience or inconvenience of the drawee in the particular case, a door will be opened to an infinity of questions, which cannot be answered but by reference to the distance of the places, accompanied also with an inquiry into the particular circumstances and connections of the drawee in respect of the places. And I apprehend, my lords, that a rule of law, liable to such questions in practice, ought not to be established without an absolute necessity, especially in mercantile cases, which, above all others, require to be governed by plain, prompt, and easy rules. My opinion,

however, upon this question is founded less upon considerations of particular convenience, than upon the general principle, to which I have before alluded, namely, that the drawer has a right to have from the drawee, considered as his debtor in the way that I have mentioned, a general and unqualified acknowledgment of his debt and promise of payment, and that no assignee of his demand can, without his assent, permit any limit or qualification at the dictation of the drawee, or by consent between those two persons. All that I have thus taken the liberty to offer to your lordships in relation to bills addressed generally to the drawee at his place of abode or business, will, I apprehend, apply with increased force to bills, which by their original form and tenor require the payment to be made at some particular place designated therein, because, in these cases, an acceptance substituting another and different place of payment, will be a manifest departure from the declared intention of the drawer. There is, my lords, *another class or form of bills of exchange not noticed in your lordships' questions, but to which I must beg leave to advert, because I conceive the considerations belonging to it to be fit to be submitted to your lordships' attention on the present occasion. I mean, my lords, bills made payable to the order of the drawer, or which is the same in effect, to the drawer or his order. If a bill so drawn be endorsed to another, without value, the endorsee becomes a mere agent of the drawer, and, of course, can never sue him upon the bill. If endorsed for value, either in the first, or any subsequent instance, the rights of the holder against the drawer do not differ from those arising on a bill drawn in favour of a person therein named. But the remedy of the drawer, to whom such a bill may be returned for non-payment against the acceptor, is, in some respects, different; the drawer of such a bill may, in this event, sue the acceptor by a special declaration, setting forth the endorsement and return of the bill, and, thereby, entitle himself to recover, in addition to the principal sum, the expense of exchange and re-exchange paid by him to the endorsee, which is the usual mode in the case of foreign bills: and, if he sue in this form, he must allege and prove a presentment and protest for non-payment. But the drawer may strike out his endorsement, and treat the bill as having remained continually in his own hands unassigned, which is the usual practice in the case of inland bills; and, in such an action, I apprehend, it is not necessary to aver or prove a presentment for payment, the bill being accepted generally. I take this to be law, because in all the numerous actions which have been brought upon bills of this description, I have never known a presentment for payment actually proved at the trial, nor the want of such proof, or of the averment, ever made a ground of objection in any stage of the proceedings. In the case of such a bill, therefore, it is obvious, that if the endorsee take an acceptance, qualified as to the place of payment, so as to render the proof of a presentment at that place necessary to the maintenance of an action by the drawer against the acceptor, he will, thereby, cast an additional burden upon the drawer, if the latter can be compelled to take up the bill; and, I conceive, the law will not allow him to do this. I have detained your lordships with the expression of my sentiments thus at length upon the third question, because my opinion upon the first and second questions, to which, with your lordships' permission, I shall now revert, depends very mainly upon the opinion which I entertain on the third question.

I consider an acceptance qualified as to the place of payment, to be followed by the consequences that I have mentioned, where the holder consents to receive it; and, if I am right in this, then the holder must, of necessity, have a right to refuse such an acceptance, because he cannot be compelled to take an acceptance, which may deprive him of his recourse against the drawer; and this seems to have been the opinion of those learned judges, who, in the decided cases, to which your lordships have been referred, considered an acceptance like the present to be a qualified acceptance. If, then, the holder may

refuse such an acceptance, or if, consenting to take it, he loses his recourse against the drawer, I must say, I am, entirely, at a loss to discover, how it can have happened, that, in no one of the thousands and tens of thousands of bills which have been accepted in this form in England in the course of the last thirty years, any holder of the bill has ever refused to take such an acceptance, or any drawer contended, that he was discharged by the holder's consent to take it. I say, my lords, that neither of those things has happened, because I have never heard of them either in or out of a court of justice. Upon this consideration, I am satisfied, that, according to the usage and custom of merchants, these words "payable at, &c." are not understood to furnish a qualification, or to import, that the acceptor will cause payment to be made, if the holder will present the bill at the place appointed, but not elsewhere, or otherwise. And I am particularly desirous to seek the meaning of these words in the usage of merchants at the Exchange, rather than in Westminster Hall; because a difference of opinion as to their meaning has, for some time, prevailed, not only among the judges now present, but, also, among some of those revered persons, who are, now, no more. I must, however, add, that the words themselves are not apt words of condition or exclusion; and that, if their meaning be doubtful, they are to be interpreted most strongly against the person using them, that is the acceptor; and the most strong interpretation against him is that which excludes, "and not that which admits, the qualification."

Much was offered at your lordships' bar by the learned counsel for the plaintiff in error, as to the inconvenience which may ensue from the interpretation, which I put upon these words; especially, in the case of a gentleman or a lawyer, who should be suddenly called upon for payment at a distant place, after having provided and left funds in the hands of his banker to discharge his acceptance. But this supposed inconvenience appears to me to rest almost wholly in suggestion and imagination. If a bill addressed to a person at his place of abode be accepted generally, I apprehend, the holder may, if he will be perverse or foolish enough to do so, take out a writ against the acceptor, as soon as the bill becomes due, without calling at his house for payment, in like manner as any other person may do, who is a creditor for goods sold for the ordinary supply of a family; so that the supposed inconvenience is equal in both forms of acceptance, but, in practice, it can rarely happen in either; because the holder, who neglects to present his bill, loses his recourse against the drawer, which no prudent man will choose to do. And, if an acceptance in the form of the present, mentioning a banking-house, is to be deemed a qualified acceptance, I apprehend, the same interpretation must be given to the words, if a house of any other description be mentioned, such as the house of any agent or friend, or even the house or place of business of the drawee, if he happen to have two and the bill be directed to one of them, or if he be about to change his place of trade or residence, before the bill will become due; or, if the bill be addressed to him at his only place of residence or business, without the addition of his place of abode, as "to A. B., merchant, London." There is, also, my lords, another ground, upon which, it seems to me, as at present advised, that I might answer your lordships' first question in the negative; and that is this: Admitting a place of payment to be specially designated by the acceptor, I apprehend, that the money is, nevertheless, due generally from the acceptor, and, that, in an action against him, his readiness to pay at the place appointed should be advanced by him as matter of defence by a special plea averring that fact, and bringing the money into court for the plaintiff's use, as in the common case of a plea of *tender, (unless indeed he can excuse himself by showing, that the money has been lost by the intermediate failure of his banker, which is a point of so much doubt, that I hope to be excused from giving an opinion upon it at present;) and, according to the ordinary rules of pleading, a plaintiff need not allege any matter the want whereof furnishes a

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ground of special defence only, and not a general answer to his demand or general defeasance of his right, unless it be the case of a condition precedent, the effect whereof is to postpone the demand until the matter of the condition be performed; and, I have already observed to your lordships, that the words "payable at the house of Sir J. P. and Co." do not appear to me to be proper words of condition. But I hope to be excused from expressing myself with confidence upon this point, by reason of the difficulty there may be in drawing an effectual distinction between the designation of a place of payment in the acceptance, and the designation thereof in the body of the bill itself, or in the body of a promissory note payable upon demand to the bearer, as was the case of *Saunderson v. Bowes*, and one or two others which have been cited at your lordships' bar, and in which it was decided, that a presentment of the note at the place therein designated, was a condition precedent to a right of action for the money. If the like question shall ever arise again, I shall consider it with the utmost deference and respect to the great learning and talents by which those decisions were pronounced, though, at present, I am not, entirely, satisfied, that, even in the case of such a note, a readiness to pay at the appointed place is not properly matter of defence alone. It is, I hope, sufficient for me to say at present, that the words of the instrument now in question are not precisely the same, and that they are found in an instrument of a different character, namely, in a bill of exchange; wherein a time certain is appointed for the payment, and of which, as before observed, I think the acceptance must be considered as given, in pursuance of an antecedent duty to the drawer, assignable by the custom of merchants, and not as creating a new duty in itself, which, in the case of *Saunderson v. Bowes*, the promissory note was considered to do.

In answer to your lordships' fourth question, I shall not trouble your lordships further than to say, I am of opinion, that an action could not be maintained under the circumstances therein mentioned, or, rather, that the delivery of the bill by the drawer to the payee, such bill still remaining in his hands or outstanding, would furnish a defence to the action according to the case of *Kearslake v. Morgan*, 5 T. R. 513, because, if the drawer could be compelled to pay the original debt under circumstances furnishing a right of action against his drawee and thereby taking his funds out of the hands of the drawee, he might, in the result, be found to pay the amount twice; directly by himself, and indirectly through the medium of his drawee. I shall be understood, my lords, to speak of a case wherein the holder has consented to take the qualified acceptance. I have clearly intimated, that, in my opinion, he may refuse to do so; and, if he does refuse, he may, in my opinion, treat the bill as dishonoured, and sue the drawer upon it.

*IN THE HOUSE OF LORDS.

Opinions given by the Judges, in Answer to certain Questions of Evidence put to them by the Lords in the Course of the Proceedings against the QUEEN, and confirmed by the House.

If a witness, without objecting to it, takes the oath in the usual form, he may be afterwards asked, whether he thinks the oath binding upon his conscience; but it is unnecessary and irrelevant to ask him, if he considers any other form of oath more binding, and such question cannot be asked.

THE following question was proposed to the learned judges by the house, and delivered to the Lord Chief Justice ABBOTT:

If a witness produced in the courts below, without objecting to it, takes the oath according to the usual form, can he be asked whether he considers the oath he has taken, as binding upon his conscience, and can he be, also, asked, whether

there are other modes of swearing more binding upon his conscience than the oath he has taken?

The judges, after having retired for some time, returned the following answer, which was thus delivered by

ABBOTT, C. J. My Lords, the judges have considered the question proposed to them by your lordships, and they have taken the liberty to detain your lordships while they sent for books, in order that they might consult the authorities referred to in the course of the argument before your lordships. My lords, the judges are of opinion, that the most correct and proper time for asking a witness whether the form in which the oath, as about to be administered to him, is one that will be binding upon his conscience, is before that oath is administered; but, inasmuch as it may *occasionally happen, that the oath will be administered in the usual form by the officer of the court, before the attention of the court, or party, or counsel is directed to it, we think, that the party ought not to be precluded; and, therefore, my lords, in answer to your lordships' first question, the judges are of opinion, that, although the witness produced in a court of law shall have taken the oath in the usual form as therein administered, without making any objection to it, he may, nevertheless, be, afterwards, asked, whether he considers the oath he has taken as binding upon his conscience. I am, further, to inform your lordships, that the judges are of opinion, that, if the witness, in answer to that question, shall declare in the affirmative, namely, that he does consider the oath which he has taken as binding upon his conscience, he cannot, then, be further asked, whether there be any other mode of swearing that would be more binding upon his conscience than that which has been used. Speaking for myself, not meaning, thereby, to pledge the other judges, though I believe their sentiments concur with my own, your lordships will allow me to speak in my own person. I conceive, that, if a witness says he considers the oath as binding upon his conscience, he does, in effect, affirm, that, in taking that oath, he has called his God to witness, that what he shall say will be the truth, and that he has imprecated the Divine vengeance upon his head, if what he shall afterward say is false; and, having done that, that it is perfectly unnecessary and irrelevant to ask any further questions.

- *1. It is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter [*286 to any person with such contents, or contents to the like effect, without having first shown the witness the letter, and asked him whether he wrote that letter.
- 2. Two or three lines of a letter may be exhibited to a witness, without exhibiting to him the whole, and the witness may be asked whether he wrote the part exhibited.
- 3. But, if the witness deny that he wrote such part, he cannot be examined as to the contents of the letter.

THE following questions were proposed to the learned judges, and delivered to the lord chief justice :

First, whether, in the courts below, a party, on cross-examination, would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness, whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness, whether the witness wrote that letter, and his admitting that he wrote such letter?

Secondly, whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part of, or one or more lines of such letter and not the whole of it, whether he wrote such part or such one or more lines; and, in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter?

The judges, after having retired for a short time, returned the following answer :

ABBOTT, C.J. My lords, the judges have conferred upon the questions propounded to them by your lordships, the first question was in these words. (Here the lord chief justice recited the first question.)

The judges are of opinion, that that question must be answered by them in the negative ; and the reason and foundation of our opinion is shortly this. The contents of every written paper, are, according to the ordinary and well established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence ; the proper course, therefore, my lords, is *287] to ask the witness, whether or no that letter is of the "handwriting of the witness ? If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence, and, when the letter is produced, then, my lords, the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the court may be possessed of the whole. If the course, which is here proposed, should be followed, the cross-examining counsel may put the court in possession only of a part of the contents of the written paper ; and thus the court may never be in possession of the whole, though it may happen, that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part.

My lords, the next question proposed by your lordships, is, (here the second question was stated.) The judges beg your lordships' permission to divide this question into two parts. In answer to the first part, namely, "Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part or one or more lines of such letter, and not the whole of it, whether he wrote such part ?" The judges are of opinion, that that question should be answered by them in the affirmative in that form ; but, in answer to the latter part, which is this, "And in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter ?" the learned judges answer in the negative, for the reason I have already given, namely, that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other.

The counsel were called in and informed, that, upon cross-examination, counsel cannot be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote "a *288] letter to any person with such contents, or contents to the like effect, unless the letter is first shown to the witness, and the witness is asked whether he wrote such letter, and admits that he did write it ; and also, that the house will allow a witness to be asked, upon cross-examination, upon showing such witness only a part, or one or more lines of such letter, and not the whole of it, whether he wrote such part, or such one or more lines. But, if the witness should not admit that he wrote such part, or such one or more lines, the witness cannot be examined to the effect of the contents of the letter, unless it is shown to him, and he admits that he wrote it.

If, on cross-examination, a witness admits a letter to be of his handwriting, he cannot be questioned by counsel whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read in evidence.

2. In the ordinary course of proceeding, such letter must be read as part of the cross-examining counsel's case. The court, however, may permit it to be read at an earlier period, if the counsel suggest that he wishes to have the letter immediately read, in order to found certain questions upon it, considering it, however, as part of the evidence of the counsel proposing such a course, and subject to the consequences thereof.

THE following question was proposed to the judges :

Whether, when a witness is cross-examined, and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the courts below, whether he did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein; and in what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read, or be permitted by the court below to be read?

The judges, after having retired for a short time, returned the following answer:

*ABBOTT, C. J. My lords, the judges have conferred upon the questions last proposed to them by your lordships: the first part of your lordships' question is in these words: "Whether, when a witness is cross-examined, and upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the courts below, whether he did or did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence, to manifest that such statements are or are not contained in the letter?" My lords, in answer to this part of your lordships' question, I am to inform your lordships, that the judges are of opinion, in the case propounded, that the counsel cannot, by questions addressed to the witness, inquire whether or no such statements are contained in the letter; but, that the letter itself must be read to manifest whether such statements are or are not contained in that letter. My lords, in delivering this opinion to your lordships, the judges do not conceive that they are presuming to offer to your lordships any new rule of evidence, now, for the first time, introduced by them; but, that they found their opinion upon what, in their judgment, is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence. The latter part of your lordships' question is, "In what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read or be permitted by the court below to be read?" My lords, in answer to this, I am to inform your lordships, that the judges are of opinion, according to the ordinary rule of proceeding in the courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; that that is the ordinary course; but that, if the counsel, who is cross-examining, suggests to the court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the court, find certain questions upon the contents of that letter, to be propounded to the witness, which could not well or effectually be done without reading the letter itself, that becomes an excepted case in the courts below, and, for the convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel, but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence.

The counsel were called in, and were informed, that when a witness is cross-examined, and upon the production of a letter to the witness under cross-examination, the witness admits he wrote that letter, the witness cannot be examined, whether he did or did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; but that the letter itself must be read as the evidence, to manifest that such statements are or are not contained therein; and, further, that it is the

opinion of the house, that, in the regular course of proceeding, the letter ought to be read after the counsel cross-examining shall have opened his case; but that the house will, upon the request of such counsel, stating that it is expedient for the purpose of his more effectually, in the course of his cross-examination, propounding further questions necessary for the interest of his client, *291] permit such letter to be read, subject to all the "consequences of having such letter considered as part of his evidence.

THE lord chancellor, by leave of the house, stated, in their presence, that a reference having been made by the learned counsel for her Majesty, at the close of yesterday's proceedings, to the trial of the Duchess of Kingston, where it was stated that a letter had been presented to a witness (Judith Phillips) on cross-examination, and having been acknowledged by her to be her handwriting, had been afterwards read in evidence, *not* as part of the defendant's case. His lordship had since referred to the printed trial, and had compared the statement contained in that with the journals of their lordships' house; and his lordship read at length the proceedings touching the same, both as they appeared in the printed trial and upon the journals of the house: after which the counsel were informed, that, in the opinion of the house, the proceedings touching the said letter, as set forth in the printed trial, did not appear to establish, or destroy, or affect the opinion delivered by the learned judges to the house yesterday; and that, according to the proceeding as they appeared upon the journals of the house, there was no statement whatever, there, to show that the letter was ever read; therefore, the house was of opinion, in the present case, to adhere to the rule as laid down yesterday.

*If, on cross-examination, it is proposed to ascertain of a witness whether he has made representations of any particular nature, immediately after being asked whether he made any representation he must be asked whether he made the representation by parol or in writing.

THE following question was proposed to the judges:

Whether, according to the established practice in the courts below, counsel cross-examining are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words?

The judges, after having retired for a short time, returned the following answer:

ASSORT, C. J. My lords, the judges have conferred upon the question proposed to them by your lordships. My lords, the judges find a difficulty to give a distinct answer to the question thus proposed by your lordships, either in the affirmative or negative, inasmuch as we are not aware that there is, in the courts below, any established practice which we can state to your lordships as distinctly referring to such a question propounded by counsel on cross-examination, as is here contained; that is, whether the counsel cross-examining are entitled to ask the witness whether he has made such representation; for it is not in the recollection of any one of us that such a question, in those words, namely, "whether a witness has made such and such representation," has at any time been asked of a witness. Questions, however, of a similar nature are frequently asked at *nisi prius*, referring rather to contracts and agreements, or to supposed contracts and agreements, than to declarations of the witness; as, for instance, a witness is often asked, whether there is an agreement for a certain price for a certain article,—an agreement for a certain definite time,—a

warranty,—or other matter of that kind, being a matter of contract; and, when a question *of that kind has been asked at *nisi prius*, the ordinary course has been for the counsel on the other side, not to object to the question as a question that could not properly be put, but to interpose, on his own behalf, another intermediate question; namely, to ask the witness whether the agreement referred to in the question originally proposed by the counsel on the other side, was or was not in writing; and, if the witness answers that it was in writing, then the inquiry is stopped, because the writing must be itself produced. My lords, therefore, although we cannot answer your lordships' question distinctly in the affirmative or the negative, for the reason I have given, namely, the want of an established practice referring to such a question by counsel; yet, as we are all of opinion that the witness cannot properly be asked, on cross-examination, whether he has written such a thing, (the proper course being to put the writing into his hands, and ask him whether it be his writing,) considering the question proposed to us by your lordships, with reference to that principle of law which requires the writing itself to be produced, and with reference to the course that ordinarily takes place on questions relating to contracts or agreements, we, each of us, think, that if such a question were propounded before us at *nisi prius*, and objected to, we should direct the counsel to separate the question into its parts.—My lords, I find I have not expressed myself with the clearness I had wished, as to dividing the question into parts. I beg, therefore, to inform the house, that, by dividing the question into parts, I mean, that the counsel would be directed to ask whether the representation had been made in writing or by words. If he should ask, whether it had been made in writing, the counsel on the other side would object to the question; if he should ask whether it had been made by words, that is, whether the witness had said so and so, *the counsel would undoubtedly have a right to put that question, and probably no objection would be made to it.

The counsel were called in, and were informed, that if, on cross-examination, they inquired of a witness whether he had made representations of any particular nature, stating the nature of those representations, they must, in their inquiries, ask the witness, first, “whether he made the representations by parol or in writing.”

The attorney-general of the Queen inquired, whether he was to understand, before he had asked whether the witness made any representations, he was to ask whether it was in writing.

The counsel was informed that he might put the question, referring, in the mode of putting it, to a representation by parol; or, that where a question of that kind was put, the counsel on the other side was justified by the practice in breaking in upon the course of the cross-examination so far as to put the question, whether the declaration, if made, was by parol or in writing.

If, on the trial of an action or indictment, a witness examined on the part of the plaintiff or prosecutor, upon cross-examination by defendant's counsel, states that at a time specified he told A. that he was one of the witnesses against the defendant, and being re-examined by the plaintiff's or prosecutor's counsel, states what induced him to mention this to A., the plaintiff's or prosecutor's counsel cannot further re-examine the witness as to such conversation, even as far only as it related to his being one of the witnesses: by eight judges against one, (B. & J., dissentient,) and confirmed by the house.

The following questions were proposed to the judges:

First, If, upon the trial of an action brought by A. (plaintiff) against B. (defendant,) a witness examined on the part of the plaintiff, upon cross-examination by *the defendant's counsel, had stated, in answer to a question addressed to him by such counsel, that, at a time specified in his answer,

he had told a person named C. D. that he was one of the witnesses against the defendant, and, being re-examined by the plaintiff's counsel, had stated what induced him to mention to C. D. what he had so told him, and the counsel of the plaintiff should propose further to re-examine him as to the conversation between him and C. D. which passed at the time specified in his former answer, as far only as such conversation related to his being one of the witnesses ; would such counsel, according to the rules and practice observed in the courts below, with respect to cross-examination and re-examination, be entitled so further to re-examine such witness ; and, if so, would he be entitled so further to re-examine, as well with respect to such conversation relating to his being one of the witnesses against B. as passed between him and C. D. at the time specified after he had told him that he was to be one of the witnesses, as with respect to such conversation as passed before he had so told him ?

Second, if, upon the trial of an indictment against A., a witness examined upon the part of the crown had stated upon cross-examination by the counsel of A., in answer to a question addressed to him by such counsel, that, at a time specified in his answer, he had told a person named C. D. that he was one of the witnesses against A., and being re-examined by the counsel for the crown, had stated what induced him to mention to C. D. what he had so told him, and the counsel for the crown should propose further to re-examine him as to the conversation which passed between him and C. D. at the time specified in his former answer, as far only as such conversation related to his being one of the witnesses, would such counsel be entitled so further to re-examine him ; and, *296] if so, would he be entitled so further to re-examine as well with respect to such conversation, relating to his being one of the witnesses against A., which passed between him and C. D. at the time specified after he had told him that he was to be one of the witnesses, as with respect to such conversation as passed before he had so told him ?

The judges having retired, returned, after some time, when, the house being informed that the judges differed in their opinion as to the answer to be given to the questions proposed to them, they proceeded to deliver their opinions *seriatim*.

RICHARDSON, J., delivered his opinion upon both questions in the negative, and referred to the reasons to be delivered by the lord chief justice of the King's Bench.

BEST, J., delivered his opinion upon both questions in the affirmative, and gave his reasons.

GARROW, B., BURROUGH, J., HOLROYD, J., GRAHAM, B., RICHARDS, C. B., and DALLAS, C. J., severally delivered their opinion on both questions in the negative, and referred to the reasons to be delivered by the lord chief justice of the King's Bench. Then the lord chief justice of the King's Bench delivered his opinion upon both questions in the negative, and gave his reasons, in which he stated he was desired by the other judges, except Mr. Justice BEST, to say that they concurred.

ABBOTT, C. J. My lords, I agree with the other judges in considering the two questions proposed to us by your lordships to be, with reference to the *297] point on which our opinion has been asked, substantially one, "and that question, as proposed by the house, contains these words, "the witness being re-examined, had stated what induced him to mention to C. D. what he had so told him;" by which, I understand, that the witness had fully explained his whole motive and inducement to inform C. D. that he was to be one of the witnesses ; and, so understanding the matter, and there being no ambiguity in the words, "I am to be one of the witnesses," I think there is no distinction to be made between the previous and subsequent parts of the conversation, and I think myself bound to answer your lordships' question in the negative.

I think the counsel has a right, upon re-examination, to ask all questions,

which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and, also, of the motive, by which the witness was induced to use those expressions; but, I think, he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. And, as many things may pass in one and the same conversation relating to the subject of the conversation, (as, in the case put by your lordships, the declaration of a witness that he was to be a witness in a cause or prosecution,) which do not relate to his motive or to the meaning of his expressions, I think, the counsel is not entitled to re-examine to the conversation to the extent to which such conversation may relate to his being one of the witnesses, which is the point proposed in your lordships' question to the judges.

And I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the *subject matter of the suit, are, in themselves, evidence against him in the suit, and, if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but, even matter not properly connected with the part introduced upon the previous examination, provided only, that it relate to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion. But the conversation of a witness with a *third* person is not in itself evidence in the suit against any party to the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive, under which he made them; but, when once all which had constituted the motive and inducement, and all which may show the meaning of the words and declarations has been laid before the court, the court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is, in my opinion, irrelevant and incompetent. On these grounds I feel called upon to answer your lordship's question in the negative.

The counsel were called in, and were informed by the lord chancellor, that the question which gave rise to the above discussion could not be put.

- *1. If a witness examined in chief on the part of the plaintiff, being asked whether he remembers a quarrel taking place between A. and B., answers, that he has heard of a quarrel between them, but does not know the cause of it, and such witness is not asked, upon his cross-examination, whether he has or has not made a declaration stated in the question touching the cause of the quarrel, the counsel for the defendant cannot, in order to prove such witness' knowledge of the cause of the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration to him touching the cause of such quarrel.
- 2. If a witness examined in chief on the part of the plaintiff, being asked whether he remembers a quarrel taking place between A. and B., answers, that he does not remember it, and such witness is not asked, on his cross-examination, whether he has or has not made a declaration stated in the question respecting such quarrel, the counsel for the defendant cannot, in order to prove that such witness must remember the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration.

THE following questions were proposed by their lordships to the learned judges, and were delivered to the lord chief justice.

First, If, in the courts below, a witness, examined in chief on the part of the plaintiff, being asked whether he remembered a quarrel taking place between A.

and B., answered, that he heard of a quarrel between them, but he did not know the cause of it; and such witness was not asked, upon his cross-examination, whether he had or had not made a declaration stated in the question touching the cause of it; and, in the progress of the defence, the counsel for the defendant proposed to examine a witness to prove that the other witness had made such a declaration to him touching the cause of such quarrel, in order to prove his knowledge of the cause of the quarrel: according to the practice of the courts below, would such proof be received?

Secondly, If, in the courts below, a witness, examined in chief on the part of the plaintiff, being asked whether he remembered a quarrel taking place between A. and B., answered, that he did not remember it; and such witness was not asked on his cross-examination, whether he had or had not made a declaration stated in the question respecting such quarrel; and, in the progress of the defence, the counsel for the defendant proposed to examine a witness to prove, that *300] the other witness had made such a declaration, in order "to prove that he must remember it: according to the practice of the courts below, would such proof be received?

The judges desired leave to withdraw, which they did; on their return,

ABBOTT, C. J. delivered the following answer to the house. My lords, the judges have considered the questions proposed to them by your lordships. One of those questions is in these words. (Here the lord chief justice read the first question.) The judges are of opinion, my lords, that this question must be answered by them in the negative. The question proposed to the witness, upon his cross-examination, is, do you remember? That question applies itself to the time of the examination; and many things may have taken place, and conversation may have been held upon them at one season by persons of the strictest honour and integrity, which may, at another season, be absent from their memory. It must be in the knowledge and experience of every man, that a slight hint or suggestion of some particular matter connected with a subject, puts the faculties of the mind in motion, and raises up in the memory a long train of ideas connected with the subject; which, until that hint or suggestion was given, were wholly absent from it. For this reason, the proof, that, at a time past, a witness has spoken on any subject, does not, in our opinion, lead to a legitimate conclusion that such witness, at the time of his examination, had that subject present in his memory; and, to allow the proof of his former conversation to be adduced without first interrogating him to that conversation, and reminding him of it, would, in many cases, have an unfair effect upon him and upon his credit, and would deprive him of that reasonable protection, which it is, in my opinion, *301] the duty of every court to afford to every person who "appears as a witness on the one side and on the other. According, therefore, to the practice of the courts below, a witness is asked, on cross-examination, whether he has made a declaration or held a conversation; and, such previous question is considered as a necessary foundation for the contradictory evidence of the declaration or conversation to be adduced on the other side. I must, however, my lords, take the liberty to add, that, in any grave or serious case, if the counsel had, on his cross-examination, omitted to lay the necessary foundation in the way in which I have mentioned, the court would, of its own authority, call back the witness, in order to give the counsel an opportunity of laying the required foundation, by putting his questions to the witness, although the counsel had not before asked them: it being much better to permit the order and regularity of the proceedings as to time and season to be broken in upon, than to allow irrelevant or incompetent evidence to be received.

My lords, this being the opinion of the judges upon the question, which I have taken the liberty to read to the house, it will follow as a consequence, your lordships will be aware, that to the other question, which applies itself to the witness' knowledge of a particular fact, the same answer in the negative

must be given ; and, in addition to the reasons with which I have troubled your lordships on the first question, it may also be added, where the question proposed regards the witness' knowledge, that, although a witness may have mentioned a fact in ordinary conversation at a former period, it does not follow, that he may have that which, in a court of law, can be considered as knowledge of the fact. A fact is often mentioned in conversation from the representation of others, without such a knowledge of it as can enable a person to say in a court of law, I know the fact.

- *1. If, on the trial of an indictment for any crime, evidence has been given upon the cross-examination of witnesses examined in chief in support of the indictment, from which it appears that A. B. (not examined as a witness,) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine C. D. as a witness to prove, that A. B. has offered a bribe to E. F. in order to induce him to give testimony touching the matter in the indictment, (E. F. not being a witness examined in support of the indictment, nor examined before it was so proposed to examine C. D.)
- 2. If, in the trial of an indictment for any crime, evidence has been given upon the cross-examination of witnesses examined in chief support of the indictment, from which it appears that A. B. (not examined as a witness,) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine G. H. as a witness to prove that A. B. has offered him a bribe, to induce him to bring to A. B. papers belonging to the party indicted, (G. H. not having been examined as a witness in support of the indictment.)
- 3. On a prosecution for a crime, the proof whereof is supposed to consist wholly or in part of evidence of a conspiracy entered into by the party then indicted, and under trial, so that the conspiracy is to be given in evidence against him,—general evidence of the existing of the conspiracy charged, may be received in the first instance, though it cannot affect such defendant, unless brought home to him or to an agent employed by him.
- 4. The same rule applies, if a defendant seeks by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of his defence, provided the proposed evidence be previously opened to the court, as in the case of a prosecution to be proved by conspiracy.

THE following questions were proposed to the learned judges.

First, If, in the trial of an indictment for a capital offence, or any crime, evidence had been given, upon the cross-examination of witnesses examined in chief in support thereof, from which it appeared, A. B., not examined as a witness, had been employed, by the party preferring the indictment, as an agent to procure and examine evidence and witnesses in support of the indictment, and the party indicted should propose, in the course of the defence, to examine C. D. as a witness to prove, that A. B. had offered a bribe to E. F., in order to induce him to give testimony touching the matter in the indictment (E. F. not being a witness examined in support of the indictment, or examined before it was so proposed to examine C. D. :) would the courts below, according to their usage and practice, allow C. D. to be *examined for the purpose aforesaid ; or could such witness, according to law be so examined, if the counsel employed in support of the prosecution objected to such examination ?

Secondly, If, in the trial of an indictment for a capital offence or other crime, evidence had been given, upon the cross-examination of witnesses examined in chief in support thereof, from which it appeared, that A. B., not examined as a witness, had been employed by the party preferring the indictment as an agent to procure and to examine evidence and witnesses in support of the indictment, and the party indicted should propose, in the course of the defence, to examine G. H. as a witness, to prove, that A. B. had offered him a bribe to induce him to bring to him papers belonging to the party indicted, (G. H. not having been examined as a witness in support of the indictment :) would the courts below, according to their usage and practice, allow G. H. to be examined for the purpose aforesaid ; or could such witness, according to law, be so examined, if the counsel employed in support of the prosecution objected to such examination ?

The learned judges desired leave to withdraw, which they did ; and on their return, prayed for leave for further time to consider on these questions till the next day ; leave was granted accordingly ; and a third question was proposed to them, which, on the next day, was withdrawn, not being sufficiently clear ; and the following question proposed in its stead.

Supposing that, according to the rules of law, evidence of a conspiracy against a defendant for any indictable offence ought not to be admitted to convict or criminate him, unless as it may apply to himself or to an agent employed by him, may not general evidence, nevertheless, of the existence of the [304] conspiracy charged "upon the record, be received in the first instance ; though it cannot affect such defendant, unless brought home to him, or to an agent employed by him ; and, whether the same rule would apply, if a defendant sought by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of his defence ?

On this day, ABBOTT, C. J., delivered the following answer to the house.

My lords, the judges conferred together for some time yesterday, upon the questions proposed to them by your lordships, and afterwards separated, in order to consider them apart, and met again early this morning, and again conferred together upon them. All of us then agreed in the answers to be given to the questions proposed to us ; and I, having read to my learned brothers the writing, which I had prepared, as containing my own sentiments and answer, it was found, that they concurred therein ; and I have their authority, with your lordships' permission, to deliver what I had written, (which your lordships will observe is in the singular number, being originally prepared as my own alone,) as containing and expressing their sentiments also.

My lords, the first question proposed by your lordships is in these words. (Here his lordship repeated the first question.) My lords, the question thus proposed by your lordships to the judges, must be admitted by all persons to be a question of great importance, as it regards the administration of justice ; and it is to me a question entirely new, and of very difficult solution. I have considered it with all the attention due to a question proposed by your lordships, and with [305] an anxiety proportioned to the importance of "the question itself ; and it is not without much diffidence, that I now offer to your lordships the result of my deliberation. Your lordships will allow me here to interpose an observation, and to say, that the diffidence I felt at the moment of writing, has been considerably decreased by the knowledge I now have, that my opinion and sentiments have received the concurrence of my learned brothers.

The question must, as it appears to me, be considered in the same mode, and must receive the same answer, as if the parties were reversed : as if, instead of proof offered on the behalf of a defendant respecting the act of an agent employed by the prosecutor, it were proof offered in reply on the part of the prosecutor respecting the conduct of an agent employed by the accused to procure and examine evidence and witnesses in support of his defence. If such proof can be received on the part of a defendant, it must be received on the ground, that it may lead to a legitimate inference and conclusion, that the witnesses examined against him, although not appearing to have been called before the court by any undue means, are, nevertheless, on this ground extraneous and foreign to them, not to be considered as the witnesses of truth. And, if such an inference and conclusion can be reasonably and legitimately drawn in favour of a defendant, in the case proposed by your lordships, I am unable to discover any principle, upon which I may say, that the like conclusion may not be with equal reason drawn against him in the analogous case that I have taken the liberty to suggest ; so that proof of this nature, if admissible, must be expected to lead as frequently to the condemnation of an innocent man by casting discredit upon his defence, as to the acquittal of such a person by disgracing the

prosecution : and this consideration enables me to contemplate the question proposed with more calmness than I *should be able to view a question, of which the determination might possibly, by the exclusion of his evidence, lead to the condemnation of an innocent person ; but could, in no case, produce the same consequence by the exclusion of evidence against him. [306]

The question proposed by your lordships regards the act of "a person employed by the party preferring an indictment as an agent to procure and examine evidence and witnesses in support of the indictment;" and it regards the act of that agent addressed to a person not examined as a witness in support of the indictment, the offered proof not apparently connecting itself with any particular matter deposed by the witnesses, who have been examined in support of the indictment, and leaving, therefore, those witnesses unaffected by the proposed proof, otherwise than by way of inference and conclusion ; and this question may be considered as it regards the prosecutor or party preferring the indictment, and as it regards the witnesses.

The prosecutor has, by the hypothesis, employed a person as an agent to procure and examine evidence and witnesses. This is a lawful employment necessary in many cases ; in some meritorious, in none disgraceful or improper, if we look either to the employer or to the person employed ; and, being a lawful employment, it is to be presumed, until the contrary be shown, that the employer means and intends, that his agent shall execute it by lawful means : and as, according to the general rules and principles of law, a person is not to be affected in interest or fame by any act of another, although that other may have been in his employment or confidence as an agent or otherwise, (excepting such acts only as either are in their own nature, or may, by extrinsic evidence, be shown to be within the scope of the authority given by him, and which may, therefore, be considered as his acts performed by the hand, or his *declarations uttered by the tongue of his appointed substitute) it would be [307] contrary to those general rules and principles to allow a prosecutor, and, through him, the prosecution that he has instituted, to be disgraced by the act supposed in your lordships' question, without some further proof affecting him than the terms of that question suggest. It is perfectly consistent with the matters of fact contained in your lordships' question, that the prosecutor may, up to the very moment when the proof is offered, be wholly ignorant of the wicked act of his agent ; it is no less consistent, that, having been informed of the act, he may have rejected it with indignation, and have repudiated the proffered testimony, and withholden the witness from the court ; and, if he be absent from the trial, which frequently happens, it may be impossible to prove his ignorance in the one case, or the propriety of his conduct on the other.

With regard to the witnesses, my lords, which is the most important part of this consideration (because, if false witnesses are produced against a person, it is of little consequence to him by what particular procurement they may have been produced,) it is to be considered, whether a legitimate inference and conclusion can be drawn against their credit and veracity from the proof proposed. The proposed proof does not directly affect them ; it regards an act, to which, according to the hypothesis, they may be entire strangers ; and, being an unlawful act, they are not to be presumed to have been parties to it, or to any other act of the like nature without proof against them, they may be persons of honour and probity depositing to facts really and truly occurring within their own personal knowledge, and taking place within their own sight or hearing as they have averred upon their oath. It may have been intended, that the person, to whom the bribe was offered, should speak to other facts occurring at another time *and in another place wholly unconnected with them or with the [308] matters to which they have deposed : can it then be reasonably concluded, that the facts deposed by them are untrue ; that, however respectable or numerous they may be, they must be all wicked and perjured men, because some other

man has, from overweening zeal or a corrupt heart, wickedly endeavoured to seduce by money another person to give evidence touching the matter of that indictment, on which they have appeared? I must say, my lords, that I am of opinion, that such conclusion cannot reasonably be drawn, either in the case proposed in your lordships' question, or in that analogous case which I have taken the liberty to adduce. The utmost effect, in my opinion, of the proposed proof (and, in many cases, even this would not be a fair or reasonable effect,) would be to excite suspicion; but suspicion is not a legitimate ground for the verdict of a jury, which ought only to be founded upon reasonable and probable proof. For these reasons, I think your lordships' first question must be answered in the negative.

This, my lords, is the opinion, which after much consideration I have formed upon the question proposed by the house. That question is couched in the most general and abstract terms, and your lordships must be aware of the difficulty that may often occur, in forming an opinion upon a question of such a nature, applied not to a matter of abstract science, but to a matter connected with the business and affairs of men. Few cases occur in the practical administration of justice, wherein a judge does not find some help toward a right decision of a questionable point in antecedent or accompanying facts and circumstances appearing before him, and is not guided in his application of general principles to the individual case by the particulars of that case itself. The question, as proposed by your lordships, does not contain any such aid or

[*309] guide; I mention not this, my lords, by way of complaint against the question, but by way of excuse for the imperfection of my answer to it; and, I must beg leave to add, that notwithstanding the opinion I have delivered on the question proposed, I am by no means prepared to say, that, in no case and under no circumstances appearing at a trial, it might not be fit and proper for a judge to allow proof of this nature to be submitted to the consideration of a jury: and the inclination of every judge is to admit rather than to exclude the offered proof.

Secondly. The same reasons which have induced me to answer your lordships' first question in the negative, lead me to answer the second question also in the negative. The question is in these words: (the lord chief justice here read the second question.)

In answer to this question, my lords, I must also take leave to add, as another ground of objection to the proof proposed in the question, that it does not thereby appear what was the nature of the papers alluded to, or what the motive of the party endeavouring to obtain them: for any thing that can be inferred from that question, the papers might be unconnected with the subject of the prosecution, and relate wholly to some other and different matter.

Then Abbott, C. J., delivered the unanimous opinion of the learned judges to the first part of the third question in the affirmative, and to the latter part of the same in the affirmative also, with a qualification, and gave their reasons as follow:

My lords, we understand the first part of this third question to relate to a prosecution for some crime, the proof whereof is supposed to consist wholly or in part of evidence of a conspiracy entered into by the party then indicted, [*310] and under trial; so that the conspiracy is *to be given in evidence against him; and the latter part of the question regards the case of a person indicted for some crime, and seeking to defend himself against that indictment, by proving a conspiracy to suborn witnesses against him; and the points of inquiry in both parts regard only the order and course of adducing the proof before the court; and, so understanding this question, we have no hesitation as to answering the first part of it in the affirmative. We are of opinion, that on a prosecution for a crime to be proved by conspiracy, general evidence of an existing conspiracy may in the first instance be received, as a preliminary step to that more particular evidence, by which it is to be shown that the individual defend-

ants were guilty participants in such conspiracy. This is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of the individual defendants; and, on that account, we presume it is permitted. But, it is to be observed, that, in such cases, the general nature of the whole evidence intended to be adduced is previously opened to the court, whereby the judge is enabled to form an opinion as to the probability of affecting the individual defendants by particular proof applicable to them, and connecting them with the general evidence of the alleged conspiracy; and if, upon such opening, it should appear manifest, that no particular proof sufficient to affect the defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine*, and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time.

As to the second part of the question, my lords, we understand it to be here assumed, that the supposed conspiracy to suborn witnesses against the accused is a *legitimate ground of defence, and that your lordships do not ask [*311 the opinion of the judges upon that point; and, therefore, upon that point, we do not presume to offer any thing to your lordships; and, considering this latter part of the proposed question, like the first part, to regard only the order and course of adducing the proof, we should give the same answer in the affirmative, with this qualification only, namely, that the proposed evidence should, in some way, be previously opened to the court, as in the case of a prosecution to be proved by conspiracy, in order to enable the judge to form an opinion as to the probability of bringing the evidence home so as to affect some person whose acts are material and relevant to the issue in the indictment then under trial.

1. When a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution, it is not competent to the party accused to examine witnesses in his defence to prove such declarations or acts, without first calling back such witness examined in chief to be examined or cross-examined as to the fact, whether he ever made such declarations or did such acts.
2. If a witness is called on the part of the plaintiff or prosecutor, and gives evidence against the defendant or accused; and if after the cross-examination of such witness, the defendant's or accused's counsel discover that the witness so examined has corrupted, or endeavoured to corrupt, another person to give false testimony in such cause, the counsel for the defendant or accused are not permitted to give evidence of such corrupt act of such witness, without calling back such witness.

THE following questions were proposed to the learned judges.

First. Whether, according to the practice and usage of the courts below, and according to law, when a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution; it would be competent to the party accused, to examine witnesses in his defence, to prove *such declarations [*312 or acts, without first calling back such witness examined in chief to be examined or cross-examined as to the fact, whether he ever made such declarations or did such acts?

Second. Whether, if, on any trial in any court below, a witness is called on the part of the plaintiff or prosecutor, and gives evidence against the defendant in such cause; and if, after the cross-examination of such witness by the defendant's counsel, they discover, that the witness so examined has corrupted or endeavoured to corrupt another person to give false testimony on such cause, the counsel for such defendant may not be permitted to give evidence of such corrupt act of such witness, without calling back such witness?

The question being delivered to ABBOTT, C. J., and the learned judges having

requested leave to withdraw to consider the same, leave was accordingly given till the next morning, when

The lord chief justice of the King's Bench delivered the unanimous opinion and answer of the learned judges to both the questions propounded to them, severally, in the negative, and gave their reasons.

ABBOTT, C. J. My lords, the learned judges have considered the questions proposed to them by your lordships. (Here the lord chief justice repeated the questions.) My lords, the only material distinction between the two questions appears to be this: viz. that, in the latter of the two, the supposed misconduct of the witness is assumed to have been discovered after his cross-examination. In the courts below, wherein causes usually begin and end at one sitting, subsequent discoveries rarely occur in the progress of a trial, the parties on each side are expected to come at the commencement duly prepared with all the proof that may be relevant to the matter in issue, and with nothing more; and we think *the only effect of a subsequent discovery, would be to allow [313] the witness to be called back for further cross-examination, if still within reach, which may be done upon that or other reasonable ground.' And we are of opinion, that, according to the usage and practice of the courts below, and, according to law as administered in those courts, the proposed proof cannot be adduced without a previous cross-examination of the witness as to the matter thereof.

The legitimate object of the proposed proof is to discredit the witness. Now the usual practice of the courts below, and a practice, to which we are not aware of any exception, is this; if it be intended to bring the credit of a witness into question by proof of any thing that he may have said or declared, touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared, that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary; and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the court at once, which, in our opinion, is the most convenient course. If the witness denies the words or declaration imputed to him, the adverse party has an opportunity, afterwards, of contending, that the matter of the speech or declaration is such, that he is not to be bound by the answer of the witness, but may contradict and falsify it; and, if it be found to be such, his proof in contradiction will be received at the proper season. If the witness declines to give any answer to the question proposed to him, by reason of the tendency thereof to criminate himself, and the court [314] is of opinion that he *cannot be compelled to answer, the adverse party has, in this instance, also, his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received. But the possibility, that the witness may decline to answer the question, affords no sufficient reason for not giving him the opportunity of answering, and of offering such explanatory or exculpatory matter as I have before alluded to: and it is, in our opinion, of great importance that this opportunity should be thus afforded, not only for the purpose already mentioned, but, because, if not given in the first instance, it may be wholly lost; for a witness, who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the court, and may not be found or brought back until the trial be at an end. So that, if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done; and, in our opinion, not unfrequently would be done both to the witness and to the party; and this not only in the case of a witness called by a plaintiff or prosecutor, but equally so in the case of a witness called by a defendant; and one of the great objects of

the course of proceeding established in our courts is the prevention of surprise, as far as practicable, upon any person who may appear therein.

The questions proposed by your lordships comprise not only declarations made by a witness; but, also, in the language of the first of those questions, "Acts done by him to procure persons corruptly to give evidence in support of the prosecution; and in the language of the latter question, "a discovery that the witness has corrupted or endeavoured to corrupt another person to give false testimony in such cause."

*My lords, we understand the acts thus mentioned to be acts occurring in the ordinary mode and usual course wherein such transactions are proved in common experience to take place, because we presume, if the questions had related to an act done in an extraordinary and unusual manner, our attention would have been directed to the special mode and circumstances of the act, by the frame and language of the questions. Now, such acts of corruption are ordinarily accomplished by words and speeches: an offer of money or other benefit derives its entire character from the purpose for which it is made, and this purpose is notified and explained by words; so that an inquiry into the act of corruption will usually be, both in form and effect, an inquiry as to the words spoken by the supposed corruptor; and words spoken for such a purpose do, in our opinion, fall within the same rule and principle, with regard to the course of proceeding in our courts, as words spoken for any other purpose; and we do not, therefore, perceive any solid distinction with regard to this point between the declarations and the acts mentioned in the questions proposed to us. It will be obvious, that the observations regarding convenience and inconvenience, which we have taken the liberty to offer to your lordships as to the proof of words, are alike applicable to the proof of acts. Nice and subtle distinctions are avoided in our courts as much as possible, especially in matters of practice, on account of the delay, confusion, and uncertainty, to which such distinctions naturally lead. For these reasons, my lords, we have thought ourselves called upon to answer both questions wholly in the negative.

END OF CASES IN TRINITY TERM AND VACATION.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,

Michaelmas Term,

IN THE FIRST YEAR OF THE REIGN OF GEORGE IV.

DAVENPORT and SMITH, Assignees of HAWKINS, a Bankrupt, v. CARTER and CURRY.

In November, 1818, a commission of bankruptcy was issued against M. and Co., under which the defendants were appointed assignees. H., being indebted to M. and Co., had deposited with the defendants, as assignees of M. and Co., a promissory note; and, in January, 1819, paid this debt to the defendants as such assignees, who then delivered the note back to him. H. had, unknown to any of the parties, in May, 1818, committed an act of bankruptcy; and in May, 1819, a commission issued against him. In August, 1819, the commission against M. and Co. was superseded; and, in September, 1819, a new commission issued against them, under which the defendants were again chosen assignees. Between the superseding of the first commission against M. and Co., and the re-appointment of the defendants as assignees under the second, the plaintiffs, as assignees of H., demanded of the defendants the sum which H. had paid to them as assignees of M. and Co. In an action by the plaintiffs as assignees of H. against the defendants in their own right, for the money received by them from H., the jury having found a verdict for the defendants, the court refused to grant a new trial.

Assumptions for money had and received. At the trial before GRAHAM, B., (Winchester Summer assizes, 1820,) the following facts were proved. In November, *1818, a commission of bankruptcy was issued against Minchin and Co. of Gosport, under which commission the defendants were appointed assignees. Hawkins, being indebted to Minchin and Co. in the sum of 20*3l. 4s. 10d.*, had deposited with the defendants, as the assignees of Minchin and Co., a promissory note for 20*0l.*; and, in January, 1819, he paid this debt to the defendants as such assignees, who, at the time of such payment, delivered back to him the promissory note. In May, 1818, Hawkins had, unknown to any of the parties, committed an act of bankruptcy, and a commission was issued against him in May, 1819. In August, 1819, the commission against Minchin and Co. was superseded, and a new commission was issued against the persons composing the firm, in September, 1819, under which the defendants were again appointed assignees. Between the superseding of the first commission against Minchin and Co. and the reappointment of the defendants as assignees under the second, the plaintiffs, as assignees of Hawkins, demanded of the defendants the sum which Hawkins had paid to them as assignees of Minchin and Co., which the defendants refused to pay: the defendants were sued in their own right, and not as assignees of Minchin, and the plaintiffs

claimed this sum on the ground, that the commission which existed at the time when Hawkins made his payment having been afterwards superseded, the defendants could not be considered at that time as assignees of Minchin and Co., or as having any title to the sum so paid them: and, that this payment could not under the circumstances be considered a valid payment under the 46 G. 3, c. 135, s. 1. GRAHAM, B. expressed his opinion that this was a case which was particularly intended to be protected by the statute, the payment being made *more than two months before the issuing of Hawkins' commission: that, at the time of the payment, the defendants were ostensibly [•319 the assignees of Minchin and Co.: and that the redelivery of the note to Hawkins showed the fairness of the transaction. The jury found a verdict for the defendant. And now,

Bosanquet, Serjt., having moved to set this verdict aside and have a new trial, for the reasons urged before GRAHAM, B.,

The Court said that, as then advised, they saw nothing in the objections, but that they would consult together on the case: and, the next morning, PARK, J. delivered the following opinion:

My brothers BURROUGH and RICHARDSON, together with myself, (a) have considered this case: and we are of opinion, that the verdict for the defendants should stand. When this payment was made by Hawkins, it is quite clear and admitted that nobody knew or suspected, that any act of bankruptcy had been committed by Hawkins: and, as four months elapsed between that payment and the commission actually issuing, it is quite clear, that, in the hands of Minchin himself, supposing that he had remained solvent, and that the payment had been made to him, that payment never could have been disturbed by virtue of stat. 46 G. 3, c. 135, s. 1. Then, how is the case altered by Minchin's bankruptcy? I think, not at all. If the first commission had remained in force, it seems admitted, that the plaintiff could not recover. But the commission was superseded; and, suppose no new one had issued, then the assignees, the defendants, would have received this money to the use of Minchin, when they supposed themselves entitled to receive it, and must have accounted to Minchin for the money. But, before they are called upon [•320 by Minchin to account, a new commission issues, and all the rights revest in them, which were supposed erroneously to be in them before, but which now are legally and validly so: and, therefore, we think there is no ground for this application. With respect to the promissory note, that strengthens my opinion; for, now, the assignees of Minchin, if made liable in this action, could never be placed in the same situation, in which they were, by again getting back the note mentioned in the motion. Rule refused.

(a) Dallas, C. J., was absent when this case was moved.

TRUSCOTT v. CHRISTIE.

The East India Company having hired A.'s ship to carry goods and 40 invalids, agreed, in concurrence with the government at Madras, to increase the number to 200, provided A. would make certain proposed alterations in his ship, and she should be found, on the usual military survey, capable of accommodating so many. A. agreed to the terms proposed, commenced the projected alterations, received the greater part of the goods on board, and had shipped water for 100 invalids, when, before the alterations were completed, the provisions shipped, or the invalids embarked, the vessel was so much disabled by a gale that she could not perform her homeward voyage. Held, in an action on a policy of insurance at and from Madras to the United Kingdom, on freight and passage-money, that there was a sufficient contract, and a sufficient inception of the risk, to render the insurers liable for the freight, and also for the passage-money of the 200 invalids.

THIS was an action on a policy of insurance, dated 26th February, 1819, at and from Madras and all parts and places in the East Indies, to the United

Kingdom, on freight and passage-money valued at 5000*l.* by the ship Cornwall. The declaration contained two counts on the policy. The first alleged, that the ship being at Madras on the voyage insured, divers goods were loaded on board her to be carried on freight on the *said voyage ; and, that it had been agreed between the plaintiff and the agents of the East India Company, that the said agents should there load divers other goods on board the said ship to be carried on freight on the said voyage, and should put on board the said ship divers passengers to be carried on the said voyage from Madras to the United Kingdom, for divers large sums of money for passage-money to be, therefore, paid to the plaintiff, and that the plaintiff was interested in the freight and passage-money to the amount of the sum insured.—The second count alleged, generally, that the plaintiff was interested in the freight and passage-money in the policy mentioned to the amount of the sum insured.—Both counts alleged a total loss by the perils of the seas.—The declaration likewise contained the usual money counts. The defendant pleaded the general issue, and paid into court a sufficient sum to cover his proportion of the freight of the goods actually on board the ship when the loss happened. At the trial before DALLAS, C. J., at the London sittings after Michaelmas term, 1819, the jury found a verdict for the plaintiff, damages 104*l.*, being the defendant's proportion of 3600*l.*, which they found to be due to the plaintiff upon the whole policy, namely, 2200*l.* for the freight of goods, and 1400*l.* for the passage-money, from which the sum of 900*l.* paid into court was to be deducted, subject to the opinion of the court upon the following case.—The defendant subscribed the policy set out in the declaration for the sum of 200*l.* The plaintiff was then sole owner of the ship Cornwall, and commanded her as master on the voyage insured. The ship was at Madras, bound from thence to the United Kingdom, in the beginning of October, 1818, and a correspondence, of which the following is the substance, passed between the plaintiff and the agents of the East India Company at Madras. By a letter, dated Madras, October 11th, *1818, the plaintiff tendered to the president and board of trade the Cornwall (naming her burden per register,) to receive any freight for England at 8*l.* per ton, and to carry 40 invalids at 28*l.* per man, the ship finding them with provisions according to the established regulations for victualling. By a letter, dated 12th October, 1818, the secretary of the board of trade informed the plaintiff, that the board agreed to pay the freight above mentioned for such quantity of goods as they might wish to lade in the Cornwall ; and to recommend to government, that invalids should be embarked in her for England at the rate above mentioned, provided there were men ready to embark, and provided the accommodation allotted for them should be approved by the military surveying officer of government. Then followed a letter, dated the 12th October, from the surveyor, (signed also by the deputy master attendant,) stating, that he had found the Cornwall a fit vessel to receive the company's cargo, and that there was also a space allotted for 50 invalids. By a letter, dated the 13th October, 1818, addressed to the president and board of trade, the plaintiff accepted the terms for tonnage stated in the letter of the 12th. By a letter, dated 19th October, 1818, addressed to the same parties, the plaintiff stated, that he had offered accommodation for 86 invalids on board the Cornwall ; but that it had occurred to him, that by giving an additional deck to the ship he should be enabled to increase the number to 200, or such number as after survey might be considered expedient, and, that he would take the additional number on terms similar to what he before proposed. By a letter, dated the same day, the deputy master attendant informed the board that he had consulted the officer by whom the ship Cornwall was surveyed, who had informed the deputy master *322] that he was of opinion that the ship would accommodate the number *of men mentioned in the plaintiff's last letter ; and added, that he (the deputy master) saw no reason why the deck should not be laid in ten or fifteen

days. By a letter, dated 22d October, 1818, addressed to the plaintiff, he was informed that the governor had approved of undertaking the projected alteration in the Cornwall, on the plaintiff's own responsibility; an assurance from government was added, that such a proportion of invalids, &c. to the extent of 200 men, would be embarked eventually, as, on the usual survey, the ship should be found capable of receiving with convenience for the voyage to England, and he was requested to give two days' notice to the board, of the time when the ship would be ready for the survey. The East India Company's servants began loading goods on board the ship a few days after the original tender, and were employed in doing so till late in the evening of the 23d of October. Early in the morning of the 24th, a violent gale came on, which drove the ship from her moorings, and by which she was so much disabled, that she was rendered incapable to perform the homeward voyage. At that time, there were loaded on board her about 140 tons of goods, (she could have carried about 80 tons more, besides passengers,) water had been shipped for 100 invalids, besides the ship's company, but no invalids or passengers were on board, nor any provisions for them, other than the water. The alteration in the ship, mentioned in the plaintiff's letter of October 19th, had been commenced but was not completed. The jury, being directed to find the amount of the loss separately, in respect of the freight and of the passage-money, found, that the ship could have carried goods, the freight of which would have amounted in all to 2200*l.*; and, that the ship would, besides, have carried invalids, on which a profit would have accrued to the amount of 1400*l.* The verdict was found absolutely, *for the sum of 48*l.*, being the defendant's proportion of the sum of 2200*l.* [*324 beyond the sum he paid into court, and, conditionally, for the sum of 56*l.*, being the defendant's proportion of the said sum of 1400*l.* for passage-money. The money paid into court covered the freight of goods actually on board.

The questions for the opinion of the court were, 1st, Whether, the policy being valued, the valuation could be opened? 2d, Whether the plaintiff was entitled to recover the sum of 56*l.*, being the defendant's proportion of the sum of 1400*l.* for the passage-money?

Blosset, Serjt., for the plaintiff, being directed by the court to apply himself to the question respecting the passage-money, proceeded to comment on the facts of the case, and to show, that a contract existed between the plaintiff and the East India Company for the conveyance of passengers, which, but for the loss of the ship by the perils of the seas, the plaintiff might have called on the company to fulfil; and he urged that, such a contract having existed, or an understanding tantamount to a contract, the plaintiff was entitled to recover; the fulfilment of the contract and the gain consequent upon it having been interrupted by the perils of the seas.

Taddy, Serjt., (*Vaughan*, Serjt., was with him) for the defendant. There was no contract as to passage-money; for, at the time the contract was made for the freight of goods, the ship was not in a condition to receive passengers, and the utmost that the correspondence with the East India Company's secretary amounts to, is, that, if the plaintiff would make certain additions to his ship, the company would recommend him to government for the passage of invalids. The men never were *embarked, the ship never was prepared to receive them, and the correspondence refers only to a projected alteration. Here was no agreement for the breach of which the plaintiff could have sued in contract or in tort. Besides this, the East India Company, as a corporate body, could not enter into a contract, except under seal. At all events, here was no inception of the risk. There is a wide difference between an insurance on goods, and an insurance on freight. With respect to an insurance on goods, there is an inception of risk as soon as any of them are put on board, because from that moment the ship-owner begins to earn freight; but there can be no inception of risk in an insurance on freight, unless the contract

for freight be in all respects ascertained and completed. *Thompson v. Taylor*, 6 T. R. 478; *Hornastle v. Stuart*, 7 East, 400; *Atty v. Lindo*, 1 N. R. 236, and *Davidson v. Willasey*, 1 M. and S. 313, are all cases of ships chartered by instruments, under seal, for an entire voyage, consisting of different parts, of which one part at least had been performed, or of which entire voyage there had been an inception. *Tonge v. Watts*, 2 Str. 1251; *Forbes v. Cowie*, 1 Campb. 520; *Sellar v. M'Vicar*, 1 N. R. 23, and *Forbes v. Aspinall*, 13 East, 323, are cases in point for the defendant: in each there was an engagement for goods to be carried home, but, as the goods were not actually on board, it was holden, there could be no recovery for freight in that respect. There is a distinction, too, between passage-money and freight; and, if the plaintiff cannot recover for freight, still less can he recover for passage-money: the quantity of goods for which freight is to be earned, is always ascertainable beforehand; here, not a single passenger had gone on board, and so far from there being any definite or completed contract, it is impossible to "ascertain how many invalids [326] the company intended to ship. No case has yet determined that a party can recover under such circumstances, unless there is a contract, by which the amount to be earned is clearly ascertained; and the doctrine hitherto laid down, ought not to be extended. [RICHARDSON, J. The case of *Parke v. Heeson*, (not yet reported,) was an action for insurance on freight; there, so far from there being any one complete or definite contract for the whole amount of the freight, the ship was what is termed a seeking ship, and was to complete its lading at a number of different places. Having part of her cargo on board, she was lost at Jamaica, in passing from one port to another to complete her cargo. The plaintiff contended, that he was entitled to recover insurance on freight for that part of the intended cargo, which was not on board at the time of the loss, as well as for that which was on board, and he produced several letters from merchants and plantation owners, respecting the intended shipments. There was no contract for any specific freight, but the party was to be paid according to the terms usual in that trade, which are well understood. The court thought that the plaintiff might recover under the principle of *Thompson v. Taylor*.] In *Parke v. Heeson*, the quantity of goods to be shipped appearing from the letters produced, the amount of freight was established by the usual terms of the trade; but here, as there are no means of ascertaining whether the plaintiff would ever have completed the alteration of his ship,—no means of ascertaining what number of invalids the company might have sent on board,—it is impossible to estimate what loss the plaintiff might have sustained. If the ship had not perished by the perils of the sea, the passage-money might have been lost by other means; the ship might never have been fitted to receive the passengers; so that if the insurer pays, he will be held to have insured against other risks [327] besides the perils of the seas. The unusual and indefinite nature of the plaintiff's undertaking distinguishes his case from that of an insurance on freight, where the ship is lost in the course of an ordinary fitting out.

Blosset, in reply, denied that there was any difference in principle between freight and passage-money; both being paid as the hire of conveyance. The contract here was in part executed, and so far complete, that the plaintiff might have sued the company, if they had refused to perform their part of it. Then, as to the possibility of the plaintiff losing his passage-money by such a refusal, or by other accident than those of the seas, that possibility existed in all cases of insurance whatever.

DALLAS, C. J. This case appears to me to resolve itself into three points. First, whether there was any contract; secondly, if there was a contract, whether any thing was done under that contract by the assured; thirdly, does the thing done, if it was done, constitute a part execution of the contract, and an inception of the risk? As to the first point, I entertain no doubt: but, with regard to this, let us go by steps. The whole contract rests on the correspon-

dence; and here I am at a loss to draw any distinction between an insurance on freight and an insurance on goods. The question, therefore, comes at last to this, whether there was any contract to ship goods and a certain number of passengers. As to goods, the existence of the contract is admitted, and the plaintiff has actually recovered for the freight of them: what then is the case as to passengers? The owner offers to receive a certain number of passengers, and his offer is referred to the government; a survey of his ship is ordered, and a report made, that she is fit for the purpose in view. In consequence of this, the owner is directed to put his ship in a proper state, [328] and he does, at once, put himself in a train to commence his alterations; so that here is not only a proposal, but an absolute acceptance of that proposal, and calculations made on the specified number of 200 men. Clearly, then, there was such a contract as the plaintiff asserts; and the next question is, whether any thing was done under this contract? It appears, then, that the ship was in part prepared for passengers, and that the completion of the preparations was prevented by the perils of the seas. This was clearly something done under the contract; and there can be no doubt, that on the commencement of preparations under the contract, there was also an inception of the risk. It is urged that the alterations of the ship were not completed; but they were begun, and though none of the passengers were on board, there was an inception of the voyage. The thing required to be done, was partly done, taking it in the most scrupulous point of view: it is not necessary, in every case, that the goods should be on board, to fix the insurer's liability, and this plainly appears from the decision in *Horncastle v. Stuart*. The question, then, being whether or no there has been an inception of the risk, let us inquire what is an inception of the risk? That may be answered by the words of Lord KENYON, in *Thompson v. Taylor*. "Here, as the plaintiff had begun to perform his part of the contract, as he had done something under it, which, if matured, would have entitled him to his freight, I think he may recover on this policy, which was an insurance on that freight." This doctrine applies to the present case; here, something was done in part performance of the contract, which was not matured, because prevented by the perils of the seas; there was, therefore, a clear inception of the risk. The objection that there was nothing settled or definite in the *contract, is completely answered by the case [329] which has been referred to by my brother RICHARDSON.

PARK, J. I agree, that the cases ought not to be greatly extended, but we may certainly decide this without breaking in upon any authorities, particularly that of *Forbes v. Aspinall*. The defendant's counsel asks for some agreement, on which the plaintiff might have grounded a right of action, either in contract or tort; we do not proceed on the ground of the mode in which the plaintiff might or might not have obtained redress for the breach of an agreement. The question is, was there a contract? In *Thompson v. Taylor*, (I am old enough to recollect all the cases cited, except *Tonge v. Watts*,) I thought, at the time, the case went too far; but the court did not go on the ground that there must be a charter-party under seal; the question was, whether there was any contract, on which, but for the perils of the seas, the plaintiff might have recovered. In the case of *Parke v. Heeson*, the contract was only deducible from letters. As to the alleged necessity of something being on board under the contract, in almost all the cases on this subject, the ship was lost before any thing was on board; it was thus in *Horncastle v. Stuart*. In *Atty v. Lindo*, part of the cargo was on board, but not that part which was the subject of insurance. In *Davidsen v. Willasey*, it is true, about half was on board. Without saying what sort of action the plaintiff might have brought against the East India Company, it is sufficient to say, that this was a sort of engagement under which they would have been liable. What then prevented the plaintiff from earning his passage-money? Loss by the perils of the sea. It is clear, that the plaintiff

had taken in water, and part of the materials which were necessary for his projected alteration ; he had, therefore, begun to execute his part of the *contract, the completion of which would have entitled him to passage-money ; that completion was prevented by the perils of the seas, and, therefore, he is entitled to his insurance.

BURROUGH, J. If this contract had been *bona fide* completed, it is clear the plaintiff would have had a claim against the East India Company. In consequence of their proposals, he begins an alteration in his ship, and, if the company had failed in their engagements, they must have paid damages ; nay, the plaintiff would have been liable to them if he had failed, and he could not have entered into any engagement for the freight of other goods. This shows, that the contract was perfect in all its parts. It makes no difference whether the contract was by charter-party or otherwise ; it is sufficient that there was a contract. The word charter-party frequently misleads, and is apt to convey the idea of something extraordinary ; but there is no magic in the word charter-party, and an agreement of any sort is equally valid. If, then, there was a contract complete in all its parts, if every thing was done on the plaintiff's part, up to the time of the loss, it would be the hardest case if he could not recover. As to the difference between freight and passage-money, what is it ? In the one case, the thing to be carried is inanimate, and in the other it is alive. I can see no other difference.

RICHARDSON, J. This is a policy at and from Madras on freight and passage-money, for 5000*l.*. The jury find a verdict for 104*l.*, being the defendant's proportion of the loss insured against ; but the verdict is absolute for 48*l.*, and conditional as to 56*l.*. The question, therefore, is, whether the plaintiff is entitled to recover 56*l.* in addition to the 48*l.* It is unnecessary to consider whether the policy can be opened or the *verdict disturbed ; the only question is, whether the defendant can recover the 56*l.* That depends on the question, whether there was a contract for the shipping of passengers, the profit of which the plaintiff lost by perils of the seas ; and I think there was such a contract. The ship is hired to carry fifty-six invalids ; then, subject to certain alterations proposed by the company, and acceded to by the plaintiff, there is a further agreement for 200 invalids. Then follows a letter, communicating the result of the survey, and an assurance is given from the government of the shipment of these 200 men ; and no question was made at the trial, as to the sufficiency of the vessel to convey these 200 men. The facts being thus before us, we must take it for granted that the ship would carry 200 passengers ; that being so, the company was bound to put them on board, and the only remaining question is, whether there was a subsisting contract under which the party could have recovered, but for its interruption by the perils of the sea. That there is no magic in a contract by charter-party, is clear from the case of *Parke v. Heeson*. But, it is urged, there could not have been a contract, because something was to be done by the plaintiff before the company would send the 200 men on board, and the ship was to be fitted up in a particular manner. In most charter-parties, however, it is stipulated, that the owner shall fit up the ship in some way required by the charterer. Surely, it would be no objection to the recovering on an insurance of freight, that the ship was lost before she was completely rigged and fitted for sea. Suppose a charterer were to stipulate for additional bulkheads or partitions for a cargo of a particular description, it could be no defence to the insurer at and from the place of fitting out, that the ship was lost before the bulkheads were completed.

*332] As to the *objection, that the plaintiff is not entitled to recover, if, perhaps, his gains might have been prevented by accidents other than the perils of the sea, the contrary has often been held, for there are many subjects of insurance which might, by possibility, be lost by other than the perils of the sea ; if, however, they are actually lost by means of such perils, that is

sufficient. Mercantile profits are an instance of this; (a) from their very nature they may be defeated by many different accidents; where, however, there is a reasonable certainty that they would have been attained but for a loss at sea, the insurer of such profits is liable to pay the loss. That is a much stronger instance than the present. I think, therefore, the plaintiff is entitled to recover the 56*l.*

Judgment for the plaintiff.

(a) *Vide Thompson v. Taylor*, 6 T. R. 483, *verba Lawrence, J.*

*JOHN BARFORD, Administrator of MARTHA ELIZABETH [*333
PITTS, v. VINCENT STUCKEY.

Deed between B. J. B. and the defendant of the one part, and N. P. of the other part, by which B. J. B. and the defendant agreed with N. P., his executors and administrators, to pay him an annuity for 21 years, if B. J. B. and the defendant, or the survivor of them, should so long live; and if N. P. should die during the term without making any appointment of the annuity, to his child or children for the residue of the term; and if there should be no child, to the widow of N. P. N. P. died within the term intestate, and without appointment, leaving M. E. P., an only child, who also died during the term intestate and without appointment. The wife of N. P. died during his life. Held that the administrator of M. E. P. could not sue the defendant on this deed for non-payment of the annuity.

DEBT on an annuity-deed, between Barnaby John Bartlett and the defendant of the one part, and Nathaniel Pitts of the other part. By this deed, which was set out on oyer, after a recital (containing statements and conditions immaterial to the present decision) Barnaby John Bartlett and the defendant did severally and respectively agree with Nathaniel Pitts, his executors and administrators, that they, Barnaby John Bartlett and the defendant, would, during a term of twenty-one years, to commence the 25th March, 1810, in case they or the survivor of them should so long live, pay or cause to be paid to Nathaniel Pitts, or, in case of his death within the term, to the use of his child or children, if any, in such proportions as Nathaniel Pitts should by deed or will appoint, or, in default of appointment, to all of them equally, and, if there should be no child, to his then wife, if she should remain his widow, an annuity of 500*l.*, by half-yearly payments. Averments that Nathaniel Pitts died within the term, intestate, and without making any appointment; that Martha Elizabeth Pitts, his only child, afterwards died within the term, intestate, and without making any appointment; and that the wife of Nathaniel Pitts also died within the term, in the lifetime of Nathaniel Pitts; that the plaintiff took out administration of the effects of Martha Elizabeth Pitts, and that three [*334 half-yearly payments of the annuity were in arrear.

General demurrer and joinder.

Taddy, Serjt., with whom was *Hullock, Serjt.*, in support of the demurrer. Martha Elizabeth Pitts is no party to this deed, and the action ought to have been brought by the administrator of Nathaniel Pitts. This deed is between parties, and where such is the nature of the deed, a stranger cannot take advantage thereof by way of action. *Scudamore v. Vandenslene*, 2 Inst. 673; *Storer v. Gordon*, 3 M. and S. 320, 322. And this doctrine applies as well to the action of debt as to the action of covenant, for *Scudamore v. Vandenslene* was brought in debt. Neither is this inconsistent with the case of *Gilby v. Copley*, 3 Lev. 138, or *Dutton v. Poole*, therein cited; for, in *Gilby v. Copley*, the promise was general, though the payment was to be made to a particular person. *Cooker v. Child*, 2 Lev. 74, and *Oddy v. Ward*, there cited by Levinz, are nearly the same in their circumstances.

Lens, Serjt., contra. The action could not be maintained by any but the administrator of Martha Elizabeth Pitts, for she alone had the beneficial inte-

rest. [DALLAS, C. J. Surely the action might have been brought by the administrator of Nathaniel Pitts.] He certainly might have sued, but he would not do so unless he were indemnified ; and when there is a party beneficially interested, it is hard that one uninterested, should be exposed to the risk of an indemnity. The objection urged for the defendant, applies only to actions of covenant, and not to debt or *assumpsit*. There is nothing in this case to interfere with the doctrine in *Scudamore v. Vandene stene*, for it was stated [335] there that *debt would not lie, only because the action arose out of the deed alone, there being no interest created beyond it ; and the doctrine recognised in Co. Lit. 238, that no stranger can take advantage of a present interest conveyed by a deed, does not apply to those who claim in remainder. The ground of the present action is an interest substantially vested in the party complaining, and therefore *Storer v. Gordon* does not apply, because that was an action merely and necessarily on the covenant. The very cases put in *Scudamore v. Vandene stene*, show the limitation of the doctrine there laid down ; they are all cases in which the parties to the deed had no claim, except by the deed itself ; and, therefore, could only sue on the deed. *Dutton v. Poole*, 1 Vent. 318, 332, and *Gilby v. Copley*, are authorities in favour of the plaintiff. Lord MANSFIELD, in *Martyn v. Hind*, Cowp. 443; S. C. Doug. 145, says it is a matter of surprise how a doubt could have arisen in *Dutton v. Poole*. In *Gilby v. Copley* is a judgment of three judges on the very point.

Taddy, in reply, was stopped by the court.

[DALLAS, C. J. It seems to me that this action cannot be maintained by the administrator of Martha Elizabeth Pitts, because she was no party to the contract, which makes it necessary to see between whom the contract really was. It was a contract between Barnaby John Bartlett and the defendant of one part, and Nathaniel Pitts of the other part : and the daughter was in no respect privy or party thereto, though in a certain event she would take a beneficial interest. To the contract, therefore, we must look, in order to ascertain the rights of the parties, and it is a general principle, that the right to sue under a contract, is confined to the parties to a deed. Now Martha Elizabeth Pitts [336] was no party to this *deed. The consideration did not move from her but from her father, and the obligation arises out of the contract itself. It is admitted, that an action might have been brought by the administrator of Nathaniel Pitts ; if he had recovered, he would have been a trustee for Martha Elizabeth Pitts ; and, if he had refused to sue, he might have been compelled by a court of equity to lend his name. It seems clear to me, therefore, looking to the contract and to the parties, that the action ought properly to have been brought by the administrator of Nathaniel Pitts, and not by the administrator of Martha Elizabeth Pitts. If the latter could also have sued, it might have occasioned two actions, and the court must have been called on to stay one of them. I think, therefore, the action is improperly brought by the present plaintiff.

PARK, J. I am of the same opinion. In order to see whether this is a vested interest, we must look to the deed. By that instrument the interest vests in the administrator of Nathaniel Pitts, and not in Martha Elizabeth Pitts, or her representative. It was admitted by the counsel for the plaintiff, that the administrator of Nathaniel Pitts might have sued ; but it was urged, why should the burden of a suit be thrown on him, when he had no interest for which to sue ? But this is every day's practice, and, as to the hardship of acting under an indemnity, it is what every executor and trustee must do. As to *Martyn v. Hind*, Lord MANSFIELD said, that the contract was not with the bishop but with the curate, Cowp. 443. The deed here being *inter partes*, it makes no difference whether the action was in debt or covenant. I find it difficult to understand the reasoning of *Dutton v. Poole*, or to see exactly how the parties in that case stood.

*BURROUGH, J. There might have been more weight in the plaintiff's argument, if the deed had contained a grant of an annuity, which it does not, but only a covenant to pay. In order to sustain the action, the deed must be shown; and then appear three objections to the claim of the present plaintiff. First, that Martha Elizabeth Pitts was no party to the deed; second, that there was no contract with her; third, that she had no legal but only an equitable interest. So that the deed being stated, it clearly appears, that no interest exists on which the present action can be sustained. As to the case of *Dutton v. Poole*, I think that was rightly decided. It was the case of a father, who wished to raise a portion for his daughter. The son promised the father to pay the daughter this portion, if the father would forbear to cut down a certain quantity of timber; and the question was, if this amounted to a sufficient consideration to entitle the daughter and her husband to sue the son: undoubtedly it was sufficient. That case does not affect the present, in which, I think, judgment must go for the defendant.

RICHARDSON, J. I think this action is not maintainable by the administrator of Martha Elizabeth Pitts. The doctrine on this subject is clearly laid down in *Scudamore v. Vandenstene*, has long since become inveterate, and was lately recognised in the case of *Gordon v. Storer*. It has been admitted by the plaintiff's counsel, that a stranger could not sue in covenant; but it is contended, that such stranger may sue on an interest arising out of the contract, though *dehors* the contract itself. This deed, however, provides for nothing but the contract itself; every thing contained in it is inducement, till we come to the promise made to Nathaniel Pitt and his executors, and after his death accruing to his children, if he should have *any. It is necessary to the action [338] that the deed should be stated; and, when that is stated, it appears that the plaintiff is no party to it. Judgment, therefore, must be for the defendant.

Judgment for the defendant accordingly.

WARMESLEY v. MACEY.

Affidavit to hold to bail, stating that R. M. was justly and truly indebted unto the said J. W. in the sum of, &c. and upwards: "as the acceptor of a certain bill of exchange, bearing date, &c., drawn by the said J. W. for a valuable consideration on, and accepted by, the said R. M., payable two months after the date thereof, and due at a day now past;" Held, to contain a sufficient description of the debt.

In this case, the debt in the affidavit to hold to bail, was as follows: "James Howe, &c. &c., on his oath saith, That Robert Macey is justly and truly indebted unto the said John Warmesley in the sum of 45*l.*, and upwards, as the acceptor of a certain bill of exchange, bearing date the 10th day of April last, drawn by the said John Warmesley for a valuable consideration on, and accepted by, the said Robert Macey, payable two months after the date thereof, and due at a day now past."

Pell, Serjt., on a former day, had obtained a rule nisi to have the bail-bond delivered up to be cancelled, on the defendant's entering a common appearance, upon two objections. First, that in the affidavit, the relation between plaintiff and defendant did not sufficiently appear; the affidavit not setting forth in what capacity or character the plaintiff sued. Secondly, that in the affidavit it was not sworn that the bill was unpaid. He said that the cases on the subject were contradictory.

Onslow, Serjt., who was to have shown cause against the rule, was stopped by the court; and

*Pell, Serjt., being called on to support his rule, contended, that the word "indebted," was no sufficient substitute for a statement that the [339]

bill was unpaid; *Balbi v. Batley*, 6 Taunt. 25, and *Perkes v. Severn*, 7 East, 194: the authority of ELLENBOROUGH, C. J., in *Taylor v. Forbes*, 11 East, 315, showed that the greatest strictness of construction should be applied to these cases. Then, according to Tidd's Forms, c. 8, s. 48, 4th ed., it should have been stated that the bill was payable to the plaintiff at a day passed. In *Machu v. Fraser*, 7 Taunt. 171, GIBBS, C. J. said, "The plaintiff swears, the defendant is indebted, on a bill drawn by the plaintiff upon, and accepted by, the defendant. Every word of this may be true, and yet the plaintiff may not be entitled to arrest the defendant; and, if so, certainly it is not such an affidavit as can support this arrest." *Bradshaw v. Saddington*, 7 East, 94, was not referred to in *Machu v. Fraser*; but, in *Bradshaw v. Saddington*, the affidavit expressly stated, that the bill was unpaid. By inference, the words used by the plaintiff, in the case before the court, might be sufficient; but the cases cited showed that nothing ought to be intended or inferred, and that the utmost strictness and particularity should be the governing principle of these affidavits. *Sands v. Graham* was also referred to. (a)

*340] DALLAS, C. J. This is an application that the defendant may be discharged, upon filing common bail, upon the ground of an alleged insufficiency in the affidavit to hold to bail. The case is that of an action by the drawer against the acceptor of a bill of exchange. The affidavit states the relation between the parties, (namely, that the plaintiff is the drawer, and the defendant the acceptor of the bill) the time when the bill was payable, and the fact of its having become due at a day then past, but, omits to state that the bill remains unpaid: and it is objected, first, that the relation between the parties is not shown with sufficient precision; and, secondly, that though the bill is stated to have become due, it is not clear that the bill is still unpaid. In the outset, it is necessary for me to observe, that this affidavit is conformable to the precedents in all the books of practice; one question, therefore, is, whether all these books are erroneous, and, in order to show that they are so, it has been said, that the cases are contradictory: for, if the matter were to rest on principle, there could not be a doubt entertained. It is necessary, then, to see if the cases be contradictory, in order, if possible, to arrive at their general result; and if that be impossible, to decide the point on principle. It is a general principle, that, in these affidavits, it is necessary to show a right to arrest; and such right is shown, by a statement of the cause of action: what shall be deemed a sufficient showing of the cause, must depend on the subject matter of the action. In actions for goods sold and delivered, many decisions have settled the forms usually pursued in such cases. I agree that the forms of these affidavits must be strictly pursued, for the reasons given by Lord ELLENBOROUGH, in *Taylor v. Forbes*, 11 East, 316. Independently of that case, there are many decisions *341] on cases of bills and promissory notes, in all of which it is said, that the relations in which the parties stand towards each other must clearly appear: and this has been sufficiently done as to the present defendant. The next thing to be shown is, that the party has a right to arrest; it is not sufficient to show that the defendant is indebted, and to show no more, because he may be indebted, and the day of payment may not be come on the day of arrest: it is necessary, therefore, to show, that the debt is payable, and that it remains unpaid. But, whatever shows that a bill is due, shows that it is payable and unpaid, and the party is not necessarily confined to any one precise

(a) Mich. 1819, Nov. 11. This court made a rule absolute to discharge the defendant out of custody upon entering a common appearance, on the ground that the affidavit of the debt, which arose on a bill of exchange, and on goods sold and delivered, was imperfect, because the affidavit did not state when the bill of exchange was due, or that it was due and not paid; and the court said, that although the other part of the affidavit was for goods sold and delivered, that would not assist the plaintiff, for the bill of exchange might have been given for the amount. The counsel for the plaintiff then prayed leave to file a supplemental affidavit, which was refused. *Vaughan, Serjt., for plaintiff; Hullock, Serjt., for defendant*. MSS. *pene* Hewlett.

form of words; if the affidavit shows that which is tantamount to the word unpaid, it will be sufficiently clear. Here the affidavit states, that the bill is due, and the acceptor indebted to the plaintiff, as drawer of the bill, which would be impossible if the bill were paid. Any other construction of the expressions of this affidavit, would do violence to common sense and reason.

So far I have proceeded on principle, nor do any of the cases cited go to contradict this principle. In *Balbi v. Bailey*, I admit, the affidavit was similar to the present; it stated, that the day of payment was past, without adding that the bill remained unpaid; but no objection was taken on this point; the objection was, that it did not appear that the bill was payable to the plaintiff; and it was held, that the plaintiff must show how he was related to the defendant. But this case of *Balbi v. Batley*, was shaken in *Machu v. Fraser*, where it was observed, that the case of *Bradshaw v. Saddington* was not cited in the discussion of *Balbi v. Batley*. However, *Balbi v. Batley*, even if rightly decided, would not apply to this cause. In *Bradshaw v. Saddington*, the affidavit was, that the defendant was justly and truly indebted to the plaintiff, in the sum of 100*l.* and *upwards, upon and by virtue of a certain bill of exchange, [**342 drawn by the said defendant, and long since due and unpaid. The objection in that case was wholly different; it was that it was not stated in what character, whether as payee or endorsee, the plaintiff charged the defendant to be indebted to him. That case, therefore, is a direct authority against the first objection. The court there said, "That the affidavit sufficiently indicated the ground on which the plaintiff had holden the defendant to bail; that it was upon a bill of exchange, drawn by the defendant, on which he was justly indebted to the plaintiff; and it was not necessary for the plaintiff to specify in what particular character, whether as payee or endorsee, he claimed. In *Sands v. Graham*, it was not stated when the bill became due; and for the reasons before stated, of course that was not sufficient. In common sense and reason, I can entertain no doubt; and when the cases are accurately looked into and traced, with the exception of *Balbi v. Batley*, they will be found to present no inconsistency. Upon the decided cases, therefore, alone, and if we could not resort to them, upon principle, it is clear, beyond all doubt, that this affidavit is sufficient.

The rest of the court concurring, the rule was discharged.

LAMB v. FREDERICK SIMON NEWCOMB.

[*343]

Same v. MARY EDWARDS.(a)

Affidavits to hold to bail: one by A. B., stating C. D. to be "justly and truly indebted to this deponent" in a certain sum, "as endorsee" of bills of exchange "drawn by E. F. upon, and accepted by, C. D., payable to the order of the said E. F., at a certain day now past, and endorsed to this deponent." The other, by A. B., stating G. H. to be "justly and truly indebted to this deponent" in a certain sum, "as endorsee of a certain bill of exchange drawn by E. F. upon, and accepted by, the said G. H., payable to the order of the said E. F. at a certain day now past." Held to contain a sufficiently certain description of the respective debts of C. D. and G. H.

In the first of these cases, the affidavit to hold to bail, sworn by the plaintiff, stated that the defendant was "justly and truly indebted to this deponent, in the sum of 400*l.*," "as endorsee of six several bills of exchange, four of the said bills for 50*l.* each, drawn by one William Oldham, upon, and accepted by, the said Frederick Simon Newcomb, payable to the order of the said William Oldham, at a certain day now past, and endorsed to this deponent; and the two other of the said bills for the sum of 100*l.* each, drawn by James Oldham and Company, upon, and accepted by the said Frederick Simon Newcomb, payable to the order of the said James Oldham and Company, at a certain day now past, and endorsed to this de-

(a) These cases were decided on the 7th November, but it was thought advisable to place them after the preceding case.

ponent," &c. The affidavit, in the second case, sworn by the plaintiff, stated, that the defendant was "justly and truly indebted to this deponent, in the sum of 36*l.* as endorsee of a certain bill of exchange, drawn by James Oldham and Company, upon, and accepted by, the said Mary Edwards, payable to the order of the said James Oldham and Company, at a certain day now past," &c.

Taddy, Serjt., now moved that these bail-bonds might be delivered up to be cancelled, and that the defendants might be discharged, on entering a common *344] *appearance, on the ground that it did not appear that the plaintiff had any right to sue on the bills of exchange mentioned in the affidavits; (no endorsement to the plaintiffs being stated in the latter of the affidavits, and the endorsement being stated too loosely in the former of them;) and that the proper form in such cases was, to state that the bill was payable to the drawer, or his order, at a certain day then past, and by him, the drawer, endorsed to the deponent. See *Tidd's Pract. Forms*, 22. He cited *Perkes v. Severn*, 7 East, 194, and admitting that the prior case of *Bradshaw v. Saddington*, 7 East, 94, was, at first view, against him, observed, that in that case, the affidavit was, as perhaps it might be, in general terms, not setting out title; but that where the plaintiff chose to set out his title, he must do it correctly.

Rule refused. (a)

(a) *Dallas, C. J.*, was absent.

A. being possessed of certain premises held under an archbishop by lease, renewable from time to time on payment of certain fines and fees, demises the premises for a term to B., who covenants "that he will, from time to time, and at every time during the said term, pay to A. or the archbishop, such part of the fine and fees which, upon every renewal by A. of the lease by which he holds the premises demised, shall be paid, or payable, by A. in respect of the premises demised to B." A. afterwards renews his lease under the archbishop for a period exceeding, by five years, the term demised to B.: Held, that B. was not liable, upon this covenant, to pay the whole of the fine and fees incurred by A. upon the renewal of his lease to the extent above mentioned, but only a part of such fine and fees, commensurate with the interest which B. had acquired in the premises.

At the trial of this cause, before *DALLAS, C. J.*, at the Westminster sittings after Hilary term, 1820, a verdict for the plaintiff, for 60*l.* 3*s.* 4*d.*, was taken by consent, subject to the opinion of the court, on a case, of which the following is the substance. The plaintiff being possessed of an estate in Surrey, which they held by lease from the Archbishop of Canterbury, dated the 9th May, 1812, for the term of 21 years, and which would expire on the 9th May, 1833, did, on the 20th November, 1816, in consideration of the rents and covenants reserved and contained on the part of the lessees to be paid and performed, grant an under-lease of part of the above estate to the defendant and his brother (since deceased) for a term of 18 years, from Lady-day, 1815, in which last lease the plaintiff covenanted with the lessees, at the end of the above term, to grant them a new lease of the said premises, for such further time as would make in the whole 59 years from Christmas, 1775, at the same rent, and which 59 years term so to be granted, would expire at Christmas, 1834, and at which period the interest of the lessees would determine altogether. There was a covenant in the last lease by the defendant and his brother, *That they would, from time to time, and at every time during the said term of 18 years, pay unto the plaintiff, or the said archbishop, such part of the fine and fees, which, upon every renewal by the plaintiff of the lease* *346] *by which they held the premises thereby demised (among others,) should be paid or payable by the plaintiff, in respect of the premises thereby demised to the defendant and his brother.* The lease, dated the 9th May, from

the archbishop to the plaintiffs, was a renewed lease, as was also the lease dated the 20th November, 1816, from the plaintiffs to the defendant and his brother, who paid to the plaintiff their proportion of the fine and fees on such renewal. On the 9th May, 1819, seventeen years after the last lease from the archbishop was granted, the plaintiffs again renewed their lease with the archbishop; and upon such renewal, the premises, the subject thereof, were demised by the archbishop to the plaintiffs, for a term of 21 years, commencing on the 9th May, 1819, the date of such lease. This last term would expire on the 9th May, 1840, and the 59 years term agreed by the plaintiffs to be made up and granted to the defendant and his brother, would expire at Christmas, 1834, when their interest would terminate. The plaintiffs, on the last renewal, on the 9th May, 1819, paid to the archbishop the sum of 1,118*l.* for a fine thereon, and 16*l.* for the fees on such renewal, of which fine and fees so paid by the plaintiffs for such renewal, the sum of 81*l. 3s. 4d.* was paid, in respect of the premises demised by the plaintiffs to the defendant and his brother, but with reference to such extended term granted to the plaintiffs as aforesaid, and exceeding, in point of time, the interest which defendant and his brother were entitled to in these premises five years and upwards. The defendant's proportion of the above sums of 1,118*l.* and 16*l.* (in respect of that part of the estate which had been demised to him and his brother by the plaintiffs,) in the event of the defendant's being liable to reimburse the plaintiffs so much of the fine and fees as was applicable to the whole extended term of seven years, obtained by *such last renewal, as claimed by the plaintiffs, was 81*l. 3s. 4d.*; but, [347] in the event of the defendant being liable to reimburse the plaintiffs such part only of that sum as may be applicable to the defendant's interest in the said premises, and to the period which would elapse between Lady-day, 1833, (when the defendant's present lease would expire) and Christmas, 1834, (up to which time only he would be entitled to have the term granted to him and his brother enlarged, being one year and nine months or thereabouts,) then his proportion of the above sum would be no more than 21*l.* The plaintiffs declared in covenant on the lease of the 20th November, 1816, for 81*l. 3s. 4d.*, stating that sum under a *scilicet* as having been paid by them in respect of the premises demised to the defendant and his brother, for the fine and fees on the last renewal. The defendant pleaded that the plaintiffs ought not to have their action for more than 21*l.*, stating that such part of the said fine and fees upon such renewal as aforesaid, in respect of the premises demised to the defendant, amounted to 21*l.* and no more, and a tender of that sum to the plaintiffs, with a *proferit in curiam* of the money tendered. The plaintiffs replied, that such part of the said fine and fees so paid upon such renewal as aforesaid, in respect of the demised premises, amounted to a larger sum than 21*l.*, to wit, the said sum of 81*l. 3s. 4d.* mentioned in the declaration; whereupon issue was joined. The question for the opinion of the court was, whether the plaintiffs were entitled to recover more than the sum of 21*l.* paid into court. If so, the verdict was to stand; but, otherwise, a nonsuit was to be entered.

Taddy, Serjt., for the plaintiffs, argued that, from the express words of the covenant, and the length of the term granted to the defendants, it was evident they *intended and undertook to pay fines and fees from time to time, [348] and to an amount more than commensurate with their interest in the premises.

Sed per Curiam. It is a reasonable, and almost a necessary, construction, that the defendants intended to pay only fines commensurate with their interest in the premises. Let there be a

Nonsuit entered.

*349] *HENRY WARTER and MARGARETTA MARY ELIZABETH WARTER, Infants, by their next Friend, v. JOHN HUTCHINSON (surviving Trustee,) and MARGARETTA ELIZABETH WARTER, an Infant, by JANE WARTER, her Guardian. And JANE WARTER, Widow, and MARGARETTA ELIZABETH WARTER, by the said JANE WARTER her next Friend, v. JOHN HUTCHINSON and HENRY and MARGARETTA MARY ELIZABETH WARTER, by their next Friend and Guardian.

J. M. devised lands to trustees, their heirs and assigns, until his nephew, J. R. M. W., son of his sister M. W., should attain 21; and if he should die in the mean time, until H. W., second son of M. W., should attain 21; and if H. W. should die in the mean time, until the daughter of M. W. should attain 21; in trust, to raise out of the rents, or by sale or mortgage, 2000l., and pay the same to H. W., when he attained 21; and if M. W. should have more than one younger child, to raise out of the rents 3000l., and pay the same among such younger children, share and share alike when they should severally attain 21; and, upon further trust, to apply a proper sum out of the rents, for the education and maintenance of J. R. M. W. till he should attain 21, and then to pay him the residue of them, if any should remain after performance of the before-mentioned trusts; and, if J. R. M. W. should die before 21, then to apply a sufficient sum from the rents for the education and maintenance of H. W. till he should attain 21, and then to pay him the residue of the rents, if any should remain after performance of the before-mentioned trusts, and in the mean time to place out at interest, for the benefit of his nephews, the money arising from the said rents; and, when J. R. M. W. should attain 21, or, in case of his death, when H. W. should attain 21, or, in case of his death, when the daughter of M. W. should attain 21, to the use of J. W. and his assigns, for life, *sans* waste; remainder to trustees, to preserve contingent remainders; and, after the death of J. R. M. W., to the use of the first, second, third, and all and every other son and sons of the body of J. R. M. W. lawfully issuing, severally, successively, and in remainder, according to priority of birth, and of the several and respective heirs male of his and their respective body and bodies lawfully issuing, the elder always to take before the younger, and the heirs male of his and their body and bodies issuing; and, in default of such issue, to the first, second, and third, and all and every other daughter and daughters of the body of J. R. M. W. lawfully issuing, severally and successively, according to priority of birth, and of the heirs male of the respective body and bodies of such first and other daughters lawfully issuing, the elder of such daughter and daughters, and the heirs male of her and their body and bodies, always to take before the younger of them, and the heirs male of her and their body and bodies issuing; and, for the default of such issue, to the use of H. W. and his assigns, for life, *sans* waste; remainder to trustees, to preserve contingent uses and estates, and then to the use of his sons and daughters, in like manner as to the sons and daughters of J. W.; and, for default of such issue, to the use of his niece, the daughter of M. W., and her assigns, for life, *sans* waste, and then to the use of her sons and daughters, in like manner as to the sons and daughters of J. R. M. W. and H. W.; and, for default of such issue, to the use of M. W. in fee: Provided that whoever became possessed of the lands should take divisor's name, and live in his house, otherwise the devise to be void as to the person refusing; his plate and furniture to remain in the house as heir-looms. T. M. died, leaving his sister M. W., her sons, J. R. M. W., H. W., and three younger children, alive. J. R. M. W. married, and died under age, leaving a daughter, M. E. M. W.

Held, that, on the death of J. R. M. W., M. E. M. W., became entitled to the lands devised, as tenant in tail male, subject to the annuities, &c.; that the heir-looms, being personalty, vested in her at the same time, and that she was entitled to the possession of them; and, that the personal representative of J. R. M. W. was entitled to the savings of the rents and profits of the estates accrued in the lifetime of J. R. M. W., subject to the annuities, &c.

THESE bills having been filed by the respective parties, for the purpose of carrying into effect the trusts of the will hereinafter stated, and declaring the rights of the several parties, the causes came on to be heard before his *350] honour the vice-chancellor, on the 17th March, 1820, when the following case, in substance, was ordered to be stated for the opinion of this court: Thomas Meredith, of Pentrehychan Hall, in the county of Denbigh, by his will, dated the 8th September, 1801, duly executed and attested to pass real estates, (after directing payment of his debts and funeral expenses,) devised his capital and other messuages, tenements, lands, and hereditaments, with their respective appurtenances, charged with two annuities, to trustees, their heirs and assigns, until his nephew, John Warter, the son of his sister Margareta Warter, should attain the age of 21 years; and, if he should die in the mean time, until Henry Warter, the second son of the said Margareta Warter, should arrive at that

age; and, if the said Henry Warter should die in the mean time, until the daughter of the said Margareta should arrive to that age; upon trust, among other things, to raise out of the rents and profits of the premises, or by sale or mortgage thereof, or of a competent part thereof, the full sum of 2000*l.*, together with all costs and charges attending the raising of the same, and to pay the same to the said Henry Warter, the younger son of his sister Margareta Warter, as soon as he attained the age of 21 years; and, if his sister should happen to have more than one younger child, to raise out of the rents, issues, and profits of the premises, the full sum of 3000*l.*, and pay the same to and amongst such younger children, share and share *alike, as soon as they should severally [*351 attain their ages of 21 years; and, upon further trust, to pay and apply a proper sum of money, arising from the rents and profits of the premises, for the maintenance and education of his nephew, John Warter, till he should arrive to the age of 21 years; and, when John Warter should attain that age, to pay him the residue of the rents, issues, and profits of the premises, if any should remain after performance of the before-mentioned trusts; and if John Warter should happen to die before he attained the age of 21 years, then to pay and apply a sufficient sum of the money arising from the rents and profits of the premises, for the maintenance and education of his nephew, Henry Warter, till he should attain the age of 21 years; and, when Henry Warter should arrive at that age, then, upon trust, to pay him the rest and residue of the rent, issues, and profits of the premises, if any should remain in their hands after performance of the before-mentioned trusts; and, in the mean time, to place out the money arising from the rents and profits of the premises, at interest, for the benefit and advantage of his said nephew; and when and as soon as John Warter should attain the age of 21 years, or, in case of his death, when and as soon as Henry Warter should arrive at that age, or, in case of his death, when and as soon as the daughter of Margareta Warter should arrive at the age of 21 years, he gave and devised the premises, with their respective appurtenances, subject as aforesaid, to the said trustees, their heirs and assigns, to the use of his nephew, John Warter, and his assigns, for life, *sans* waste; remainder to trustees, to preserve contingent remainders; and, after the decease of John Warter, to the use of the first, second, third, and all and every other son and sons of the body of John Warter lawfully issuing, severally, successively, and in remainder, as they and every of them should be in priority of birth and seniority of age, and of the *several and respective heirs male of his and their respective [*352 body and bodies lawfully issuing, the elder of such son and sons, and the heirs male of his body, being always to be preferred and to take before the younger of them, and the heirs male of his and their body and bodies issuing; and, in default of such issue, to the use of the first, second, third, and all and every other daughter and daughters of the body of John Warter lawfully issuing, (severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth,) and of the heirs male of the respective body and bodies of such first and other daughters lawfully issuing, the elder of such daughter and daughters, and the heirs male of her and their body and bodies, always to be preferred and to take before the younger of them, and the heirs male of her and their body and bodies issuing; and, for default of such issue, to the use of his nephew, Henry Warter, the second son of the said Margareta Warter, and his assigns, for life, *sans* waste; and, after the determination of that estate, to the use of trustees, to preserve contingent uses and estates; and, after the decease of Henry Warter, to the use of his sons and daughters, in like manner as to the sons and daughters of John Warter; and, for default of such issue, to the use of his niece, the last-born child of his sister Margareta Warter, and her assigns, for life, *sans* waste; and, after her decease, to the use of her sons and daughters, in like manner as to the sons and daughters of John and Henry Warter; and, in default of such issue

to the use of his sister Margareta Warter, in fee : Provided always, that John Warter, or whatsoever other person or persons should, by virtue of the devisor's will, become possessed of or entitled to his estates, should, from the time he, she, or they should become so possessed, take upon himself, herself, or themselves, the surname of Meredith, and should make the mansion-house of Pen-trebychan Hall, *aforesaid, their usual and common place of residence ; and, in case John Warter should refuse or neglect to reside at, and make use of, Pentrebychan Hall, as his usual place of residence, and take upon himself the surname of Meredith, then the will was to be void, to all intents, with respect to him, and all and every other person and persons claiming under him who should so refuse to comply with such directions ; and in like manner in respect to Henry Warter, and the daughter of Margareta Warter, and every other person and persons claiming under them by virtue of the devisor's will, in case he or they should refuse to take the surname of Meredith, and reside at Pentrebychan Hall ; and as to all his household goods and furniture, and all his silver plate whatsoever, that should happen to be at his mansion-house at Pentrebychan Hall at the time of his death, he ordered that the same, or any part thereof, should not be sold, disposed of, or removed from thence, but that the same, and every part thereof, should be deemed to be heir-looms, for the use of the heirs of Pentrebychan Hall for ever ; of which will the devisor appointed Richard Edwards, and his aunt Mary Newton, executors.

The devisor being dead, his will was proved in the Consistory Court of St. Asaph by both executors. Joseph Warter and Margareta his wife, John Richard Meredith Warter, (in the will called John Warter,) their eldest son, and Henry Warter, their second son, also named in the will, survived the devisor ; and Joseph Warter and Margareta his wife also had living, at the death of the devisor, three other younger children, viz. Joseph, Thomas, and Margareta Mary Elizabeth, being the daughter mentioned in the will.

John Richard Meredith Warter, on or about the 5th August, 1816, duly intermarried with Jane Jones ; and on or about the 6th April, 1817, died intestate, without *having attained his age of 21 years, leaving Jane Warter, his widow, and Margareta Elizabeth Meredith Warter, his only child by her and heir at law, him surviving.

The questions for the opinion of the court are,

First, Whether, upon the death of the said John Richard Meredith Warter, under 21 years, the said Margaret Elizabeth Meredith Warter, his only child, became, and is now entitled, as tenant in tail male, to the said devised estates and premises, either as a legal or equitable estate ; and whether she was entitled to the possession of the said premises immediately on the death of her father, or at any and what subsequent period of time.

Second, Whether the articles directed to pass as heir-looms, being personality, vested in her absolutely ; and whether she, on the death of her father, or at what other period, was entitled to the possession thereof.

Third, And who, whether the said infant child of the said John Richard Meredith Warter, his widow, or the said Henry Warter, is entitled to the savings of the rents and profits of the estates accrued due in the lifetime of the said John Richard Meredith Warter.

This case was twice argued : first, in Trinity term last, by *Peake, Serjt.*, for M. E. M. Warter, and *Blosset, Serjt.*, for Henry Warter ; and now, by

Lcns, Serjt., for M. E. M. Warter, and *Vaughan, Serjt.*, for Henry Warter.

For M. E. M. Warter, it was thus argued :—J. R. M. Warter took a vested estate immediately on the death of the testator, though he was not to enter into possession till he attained 21. On his death, before attaining 21, his daughter took an estate in tail male. There are two sets of provisions in the will : one set relates to the maintenance and education of parties who may come into the

estate while under age, and the disposition of the profits while such parties continue minors ; the *other points out the course in which the testator intends the various objects of his bounty should succeed to the property. [*355 If the first of these two sets of provisions be taken separately, without considering the effect of the other at the same time, some confusion may arise as to what might have been the testator's intention ; but if the two sets of provisions be considered together, as they ought to be, in order to collect the intention from the whole of the will, then it is clear that the living till 21 was never intended by the testator as a condition precedent to J. R. M. Warter's being entitled to the estate, but was merely mentioned to specify the time when he should come into the management and control of it, and the case then falls completely within the decision of *Manfield v. Dugard*, 1 Eq. Ca. Abr. 195, which was a stronger case than the present. That case was recognised in *Goodtitle d. Hayward v. Whitby*, 1 Burr, 233, where Lord MANSFIELD puts the very case now before the court. The doctrine is well established, being founded on *Boraston's case*, 3 Rep. 19, Fearne, 242, 6th ed., and repeatedly recognised in subsequent cases, *Doe d. Weedon v. Lea*, 3 T. R. 41; *Tomkins v. Tomkins*, cited 1 Burr. 234. If this be so, the trustees took a chattel interest sufficient to enable them to perform the trusts of the will ; for, if these trusts could be performed by any quantity of estate less than a fee, the trustees take no more than is sufficient for their purpose, *Curtis v. Price*, 12 Ves. jun. 89; *Doe d. Lee Compere v. Hicks*, 7 T. R. 433; *Doe d. White v. Simpson*, 5 East, 162. The heir-looms also vested in him when the estate vested, *Carr v. Lord Erroll*, 14 Ves. jun. 478.—Sir W. Cordell's case, Cro. Eliz. 315, cited in *Manning's case*, 8 Rep. 95 b.; *Liese v. Saltingtone*, 1 Mod. 189; *Dighton v. Tomlinson*, 1 Comyns, 194; S. C. 1 Peere Wms. 149; *Yates v. Compton*, 2 Peere Wms. 308; *Denn v. Satterthwaite*, 1 Bl. 519, were [*356 also cited.

For Henry Warter, it was thus argued :—It may be admitted that the provision in the will as to J. R. Warter's dying before 21, is not a condition precedent ; but it is a condition subsequent, which, on his dying before 21, devests the estate which vested in him on the death of the testator. The same words may effect the testator's intention, *Stocker v. Edwards*, 2 Show. 398. The intention must prevail in a will, where that intention is consistent with law ; but, then, the intention must appear on the will. Now, here there is no intention expressed by the testator to provide for the issue of J. R. M. W. in case of his leaving issue before 21. The event of his dying before 21, leaving issue, was not in the testator's contemplation : and if so held to be, many of the provisions of the will must be expunged. The testator had in view the possibility of J. R. M. W.'s dying without issue before 21 ; and for that contingency he has expressly provided, directing the profits in such case to go over to Henry. But it is clear, the contingency of J. R. M. W.'s dying before 21, and leaving issue, did not occur to his mind ; for, if it had, there would have been a provision to meet such contingency ; and it cannot now be provided for, unless the court interpolates the words, “if he should die under 21 without issue,” which there is the less ground for doing, as the will was evidently drawn by one well skilled in law. The decision in *Edwards v. Hammond*, reported in Shower under the name of *Stocker v. Edwards*, turns entirely on the supposed existence of those words ; *though, upon a reference to the record in arguing a later case, *Bromfield v. Crowder*, 1 N. R. 313, they were found not to be in the will ; but here the testator *nec voluit nec dixit*. Nothing is more usual than for a man to forget or omit provisions in a will, which it might have been prudent for him to have inserted, especially in such a case as the present ; for it is much out of the ordinary course of things that a man should marry, die, and leave issue, before he attains 21. But, if there be such an omission, the court cannot supply it. If the testator meant the estate to descend to J. R. M. W.'s child

in such a case, why has he left the rents and profits to Henry, upon J. R. M. W.'s death before 21? It is not necessary to answer the cases cited on the other side; they may all be admitted, and are not at variance with the present case. In those cases no condition was annexed to the devise, and the single question was, whether an estate vested or no; there were no words to raise the point, whether a dying before 21 would divest that estate. *Brownsword v. Edwards*, 2 Ves. 243, is very like the present case; and *Bromfield v. Crowder*, 1 N. R. 313, seems in point for what is now contended. So, *Doe d. Hunt v. Moore*, 14 East, 601, *Hodgson v. Ambrose*, Doug. 323, and *Hay v. Earl of Coventry*, 3 T. R. 83, show that the words of a devise cannot be extended by implication. As to the other points, it may be admitted that the first taker of an estate tail would be entitled to the heir-looms, and that the trustees would not take a greater estate than would suffice for their executing the various trusts under the will.

In reply, it was urged, that *Bromfield v. Crowder*, and *Doe d. Hunt v. Moore*, turned on the particular provisions of the wills on which they were decided, and "thus did not apply to the present case, if the two sets of *358] provisions in Thomas Meredith's will were, as they must be, taken together. All the reasoning on the other side rested on the separation of these provisions, and the construing them singly; a construction which the court would never make, but would rather seek to discover the intention from the contents of the whole will taken together. If so, the cases cited at first were directly in point.

The following certificate was afterwards sent:

This case has been argued before us by counsel; we have considered it, and are of opinion,

First, That, upon the death of John Richard Meredith Warter, under the age of 21 years, Margaretta Elizabeth Meredith Warter, his only child, became, and is now, entitled to the devised estates and premises, as tenant in tail male of the legal estate; and that she was entitled to the possession of the said premises immediately on the death of her father, subject, however, to the annuities, debts, and legacies charged by the will of Thomas Meredith.

Secondly, That the articles directed to pass as heir-looms, being personalty, vested absolutely in the said Margaretta Elizabeth Meredith Warter, on the death of her father, and that she was then entitled to the possession thereof.

Thirdly, That the personal representative of the said John Richard Meredith Warter is entitled to the savings of the rents and profits of the estates, accrued in the lifetime of the said John Richard Meredith Warter, subject, however, to the said debts and legacies.

R. DALLAS,
J. A. PARK,
J. BURROUGH,
J. RICHARDSON.

Dec. 7, 1820.

A turnkey cannot be bail.

ONE of the bail brought up to justify in this case, was a turnkey of the King's Bench prison. He was opposed, as falling within the rule of Hil. 7 Geo. 2, which forbids sheriff's officers, and others concerned in the execution of process, from becoming bail; and the court being of opinion that he fell within the rule, he was rejected.

Lawes, Serjt., for the defendant.

Onslow, Serjt., for the plaintiff.

HANDFORD v. PALMER.

1. The declaration stated, that in consideration plaintiff would, at the request of defendant, lend him a horse, defendant promised to take proper care of the horse, and return him to plaintiff in as good a condition as he was in at the time of the promise, or pay fifteen guineas; the contract proved was, in addition to these terms, that the defendant should find the horse meat for his work: Held, that the contract was sufficiently stated in the declaration, and according to its legal effect.

A party who borrows a horse is bound to keep it, unless an agreement is made to the contrary.

THE plaintiff declared, that in consideration he would, at the request of the defendant, deliver and lend the defendant a certain horse, from the 10th of November to Lady-day, the defendant undertook and promised that he would take proper care of the horse, and would, at Lady-day, return him to the plaintiff in as good a condition as he was in at the time of the defendant's making that promise; or that, on failing to do so, he would pay the plaintiff 15*l.* 15*s.* Breach, that defendant did not take care of the horse; nor did *he, at Lady-day, return the horse in as good a condition as he was in at the time the promise was made; nor did the defendant pay the [360] 15*l.* 15*s.*

At the trial, before BURROUGH, J., Wells Summer assizes, 1820, the contract proved was, in addition to the terms above stated, that the defendant should find the horse meat for his work. Verdict for the plaintiff.

Lens, Serjt., having obtained a rule *nisi* for a new trial, on the ground of a variance between the contract stated in the declaration and that given in evidence, urged, that it did not appear, from the declaration, whether the plaintiff or defendant was to feed the horse during the time of the loan, and that, therefore, the whole of the consideration for the bargain was not stated.

Pell, Serjt., for the plaintiff, answered, that the consideration was set out in substance and effect; and that a promise to take care of a horse, is a promise to feed him, if nothing is shown to the contrary.

Dallas, C. J. If it had been part of the contract that the plaintiff should feed the horse during the time of the loan, and he was not properly fed, the defendant would not have been liable for that. Every contract must be truly stated, and according to its legal effect; but it is sufficient, if it be stated according to its legal effect. The point then, is, whether this contract is set out according to its legal effect; and we must, therefore, inquire what the law will imply on such a contract; and the natural presumption and intendment of law is, that the party who borrows a horse is bound to keep it, unless, at the time, something is said to the contrary. But independently of this, the rule as to setting out contracts is, that it is sufficient to set out *such parts of them [361] as are relevant to the consideration and breach, and will entitle the plaintiff to recover. The plaintiff, here, does set out that which will entitle him to recover. He does not complain that his horse has not been fed, but that he has not been returned in good order.

Park, J., expressed himself of the same opinion, and referred to *Cotterill v. Cuff*, 4 Taunt. 285; *Tempest v. Rawling*, 18 East, 18.

Burrough, J. It is a rule in pleading, that you need not set out what the law implies, and it implies here that the defendant should feed the horse; if the defendant did not feed him, how could he return him in as good a condition as he received him?

Richardson, J. It may not be necessary, in all cases, to set out the whole contract, but only so much as makes the consideration for the promise. I think the engagement to find meat was no part of the consideration for the defendant's promise. If the converse had been the case, and the plaintiff had engaged, it might have been so. Sufficient appears on the declaration, to show the consideration for the defendant's promise. If a horse is lent, surely, the

law, where nothing is agreed to the contrary, casts on the borrower the obligation of feeding the horse. But, in effect, the contract is so stated, when it is said, the defendant promised to take care of him.

Rule refused.

*PEACOCK v. PURVIS.

A stranger became possessed of a crop of growing corn by purchase at a sale under a *fieri facias*, upon which sale the landlord was paid a year's rent. The landlord, before the corn was ripe, distrained it for rent due subsequently to the sale: Held, that the distress was ill.

Growing corn sold under a *fieri facias* cannot be distrained for rent, unless the purchaser allow it to remain on the ground an unreasonable time after it is ripe.

REPLEVIN for growing corn. Cognisances for half a year's rent, due the 12th of May, 1819. Pleas. First, *non tenuit*; second, a writ of *fieri facias* issued upon a judgment recovered by the plaintiff, in Hilary term, 1819, against W. Peacock, under which the sheriff seized the corn on the 28th April, 1819, and, having paid the landlord one year's rent, sold the corn (not saying by agreement in writing) to the plaintiff, who then became possessed of the same. There were also pleas, stating a custom for a waygoing crop. General demur-
rer and joinder.

Hullock, Serjt., for the defendant, stated the question to be, whether growing corn seized under a *fieri facias* is liable to the landlord's distress, in respect of rent accruing subsequently to the seizure under the *f. fa.*, the sale, and the sheriff's departure, [BURROUGH, J. And before the corn could be taken away] and objected, first, that the pleas were bad on the face of them, in respect of their not showing (as he contended they ought under the statute of frauds,) that the property in the corn (being an interest in land) was transferred to the plaintiff by writing, a degree of certainty necessary in a plea, though the rule might be otherwise as to a declaration. *Case v. Barber*, Sir T. Raym. 450. And see 1 Wms. Saund. 276 n, 1, 2; *Emmerson v. Heelis*, 2 Taunt. 38; *Crosby v. Wadsworth*, 6 East, 602. But the court being against him on this point, and observing that assignments of terms of years were commonly pleaded without a statement of any writing, he then urged, that admitting that growing crops

*363] could be taken in execution *(which could not now be disputed, though it was by no means clear how the law became established,) a party who

purchased such crops under a *fieri facias*, purchased them, subject to all the legal liabilities which attached to them. Liability to a distress for rent was an inseparable incident to all goods found on a tenant's premises, and, by the 11 Geo. 2, growing crops were, in this respect, placed on the same footing as goods and chattels. If a party bought a horse or cart under an execution, and chose to leave them on the premises, it was clear, they were liable to distress. If this corn had been sold by the tenant, it would also have been clearly liable, and the sheriff could only sell it, subject to the liabilities and charges which he found attached to it. Things purchased under an execution should be taken away at once, for they are not protected after the sheriff is gone, *Blades v. Arundale*, 1 M. & S. 711; and, therefore, the corn, in the present case, could not be in *custodia legis*. So that, before or after it was cut down by the purchaser, the landlord was entitled to distrain it, like any other chattel on the premises.

Parslow v. Cripps, 1 Comyns, 204, and *Eaton v. Southby*, Willes, 131, seemed to countenance this doctrine, though there was no decided case on the subject: but in *Gwilliam v. Barker*, 1 Price, 277, there was a dictum of THOMSON, C. B., exactly in point. If the law were otherwise, the landlord might always be defrauded of the rent for a tenant's off-going crop, by the tenant's colluding with some fictitious creditor, and transferring the crop under an execution.

D'Oyley, Serjt., for the plaintiff. If the doctrine advanced on the other side

be law, all writs of *fieri facias* for the sale of growing crops will be nugatory : for no man will buy, unless he can be assured of reaping the fruits of his purchase. Though, after the departure of the sheriff, crops sold under an execution are not absolutely *in custodia legis*, yet they are still within the object and scope of the proceeding ; that proceeding is not a mere form to transfer the property to a purchaser, but has for its object to satisfy a judgment creditor, who will never be satisfied if a landlord can intervene and deprive him of his purchase. Admitting that, after a sale by the tenant himself, the crop, if not taken away, would be liable to distress by the landlord, the case here is very different from that of a sale by the sheriff. The sale by the tenant is not like that by the sheriff, a transfer by operation of law, to satisfy a judgment creditor, with a provision to guard the rights of the landlord, by allowing him a year's rent before any thing is paid over. In all the cases where a landlord has been permitted to distrain goods sold under an execution, the purchaser has left them, voluntarily, on the premises, omitting to remove them within a reasonable time : but here, the purchaser was obliged to leave his crop to ripen, and could not take it away before harvest time, without committing waste and spoliation. So that the only question in all these cases, is, whether or no the property has been removed within a reasonable time ; with respect to growing crops, the reasonable time must certainly extend to harvest. It would be most unjust, if the landlord, having had one year's rent out of the sale of the crop on the *fieri facias*, should now be permitted to distrain for another half-year on the same crop. As to the cases, there is not one which authorizes the defendant's plea. In *Eaton v. Southby*, the decision turned on another point, namely, that the emblements of an outgoing tenant were not distrainable for the rent of an incoming tenant. The dictum of THOMSON, C. B., in *Gwilliam v. Barker*, was extra-judicial, *and seems to be contradicted in *Hoskins v. Knight*, [365] 1 M. & S. 245. *Blades v. Arundale* does not apply.

Hullock, in reply. Executors and assignees take by operation of law, and yet goods in their hands are distrainable for rent due from the testator or bankrupt : but the party here does not come in by operation of law. The sheriff, indeed, may sell by operation of law, but the purchaser takes under his contract.

Dallas, C. J. Though this question is not altogether new, there certainly are no decisions expressly in point. But different cases have been referred to ; first, one in Willes ; next, a case containing a dictum of the late lord chief baron ; and I shall begin by adverting to these, before I proceed to investigate the principles on which the present case must turn. In the case in Willes, the question now before us was not decided, although it was presented for the consideration of the court ; because, upon the facts of that case, it became necessary to decide it. But it was certainly stated, that if the present question should occur, "it might have required very good consideration, it being a point of very great consequence. That goods taken in execution, or even goods distrained damage feasant, are in the custody and under the protection of the law, and, therefore, cannot be distrained for rent, is expressly holden in Co. Lit. 47 a, and several other books ; and we are inclined to be of this opinion."—"But we think we have no occasion to enter any further into this matter, because we are all clearly of opinion, that if there had been no execution in the present case, yet the corn could not be distrained." That case, therefore, only proves the court to have thought, that this point, if presented for decision, would have required their best consideration. *Gwilliam v. Barker* was similar, in fact, to the present case, though the question before the court in that case is not the question here. [366]

It is admitted that a dictum is to be found in that case, in favour of the landlord's right to distrain, but that was not the point on which the decision turned ; and this dictum of a moment is perhaps impaired by what follows. "I do not think the statute applies to corn in the blade ; it would be a monstrous thing to

cut it in such a state." So that it seems inconsistent with the argument used to-day, and with the statute, because by the statute, corn in the blade may be distrained. This, therefore, being a new question, that is a new question in judgment, and one on which no express decision can be found, we must recur to principle, in order to arrive at a decision ; and, in considering the point on principle, we must look to the reason and sense of the thing. With respect to an execution on goods, the course of the sheriff is clear and easy ; he seizes, makes a bill of sale, delivers the goods to the purchaser, and retires ; and why does he deliver the goods ? because he can deliver them, and is therefore bound to do so : that makes it necessary for us to consider the distinction between goods and growing corn. It is admitted, the law authorizes growing corn to be seized ; and why ? to satisfy the judgment.

But the writ of *fieri facias* would be quite nugatory towards such a purpose, in a case like the present, if the right of the party were to cease the moment the bill of sale is executed, and if he were not allowed to wait till the corn became ripe and valuable, in order to reap the benefit of his purchase. With respect to goods, it is true, the sheriff, or the person purchasing of him, is bound to remove them within a reasonable time ; but it is to the delivery that the law looks, and that must be made within a reasonable time ; so here, the sheriff is *367] *bound to deliver, and in a reasonable time ; but being so bound, when is it he can deliver ? when the corn is ripe ; and, after that period, it must not remain an unreasonable time. The question, therefore, always is, what is a reasonable time for delivery ? and I fully agree with the counsel for the plaintiff, that the delivery of the crop and the satisfaction of the judgment, are the objects of the law ; that not only things actually in the hands of the sheriff are *in custodia legis*, but that, virtually, all things taken in execution remain in such custody till the sheriff can deliver them, so as to give effect to the judgment. If there be any doubt as to this, we should refer to the statutes respecting landlords ; by those statutes, growing corn is considered as goods ; and the provisions touching a distress of such corn are, that it is to be distrained as if it were goods and chattels. I put, therefore, the same construction on this case, in favour of creditors, as obtains, under the statutes, in favour of landlords. My opinion clashes with no authority ; and being called on to decide on principle, I think, on principle, the defendant had no right to distrain.

PARK, J. The question was well put by the counsel for the defendant, with the addition which was made by my brother BURROUGH ; and that is the fair question in this case. If the decision of the court were any other than it is to be, the effect of the law would be entirely destroyed ; because, how could the law be available to execution, if those who purchased under a sheriff were not allowed to retain what they had bought ? But the doctrine is not entirely new ; for, though there was no direct decision on the point in the case in Willes, the language of the court, there, is a pretty strong argument, to show that their opinion was against what the defendant contends for. I agree with the counsel *368] for the plaintiff in his argument, that if the law *authorizes this property to be taken under an execution, it authorizes every thing which will make that execution available. Here, all was done which was requisite to render the seizure legal ; the landlord had his deduction fairly allowed at the time, and the purchaser must be allowed to retain what the law has given him.

BURROUGH, J. I have a high opinion of whatever proceeded from the late Chief Baron THOMPSON, but I do not think that which has been ascribed to him was his deliberate opinion ; and the intimation of the court in Willes is an authority the other way. I am clearly of opinion that these goods were in the custody of the law. For, how does the case stand ? Here is a judgment creditor, who purchases growing corn under an execution, but he has no satisfaction till the corn is carried away, and till then, he is under the protection of the law. The case of assignees and executors differs from the present : they stand

only in the place of the bankrupt and testator, and there is a continuation of the same right of property; here, the property is transferred from one hand to another. Supposing we were not to decide as we have done, it would only alter the practice, and cause executions to be kept alive from term to term, it being clear that the landlord is entitled to no more than one year's rent on the execution of a *fieri facias*.

RICHARDSON, J. I am of opinion, that crops in the hand of the sheriff's vendee are protected from distress; and this is a necessary consequence of allowing such crops to be liable to seizure. That, however, is clearly so, though little on the subject is to be found in the books. It has always been held as undoubted, which perhaps is the reason why so little appears; such crops are *fructus industriaes*, which would go to the executor, and therefore have been considered seizable as goods *and chattels. But, where the law authorizes a seizure, it authorizes all that which will make the seizure available. [*369 Now here the seizure would be utterly unavailable, if the purchaser could not retain that which he bought under the sheriff's sale. *Eaton v. Southby* comes very near the present case, though there it was not necessary to decide the point; but the chief justice, in delivering the judgment of the court, thought growing crops might be protected after sale by the sheriff. Though the statute of 11 Geo. 2, gives landlords great powers, which they did not possess before, yet it only enabled them to distrain crops in the same manner as other goods. But other goods must always be taken as subject to any prior rights which may have attached to them: here, a right had attached to the crop in question, incompatible with the landlord's distress. In order, therefore, to make the writ of *fieri facias* available to the purposes for which, by law, it was intended, there must be, in this case,

Judgment for the plaintiff.

ABBOTTS and Another v. BARRY.

The defendant having fraudulently induced the plaintiff to sell goods to A., who could not pay for them; and, on the nominal resale of these goods by A., in which the defendant was really concerned, having obtained himself the money paid on such resale: Held, that the plaintiff might, in an action for money had and received, recover of the defendant the value of the goods unpaid for by A.

ASSUMPSIT for goods sold and delivered, money had and received, and the other money counts. (a) The following case, in substance, was proved at the trial *before PARK, J., (London sittings after Trinity term last:) Phillips [*370 being indebted to the defendant, for the purpose of discharging the debt, procured wines from the plaintiffs, by a string of contrivances, which amounted to a gross fraud, paying the plaintiffs only half the price of the wines, and giving a bill, which was of no value, for the residue. In these contrivances, the defendant was prime mover and participator, and furnished Phillips with the money to pay in part. The wines were then, under defendant's direction and brokerage, sold in Phillips' name, to Bunyan, who accepted a bill drawn by Phillips for the amount, which Phillips immediately endorsed to the defendant.

The jury found a verdict for the plaintiffs, on the ground that a gross fraud had been practised on them by the defendant; the learned judge giving leave to the plaintiff to move to set aside this verdict, and enter a nonsuit. Accordingly,

Vaughan, Serjt., having, in the last term, obtained a rule *nisi* to that effect; *Pell, Serjt.*, now showed cause, and, after stating the circumstances of the

(a) There was a special count which was abandoned.

fraud, cited *Hill v. Perrott*, 3 Taunt. 274, as governing the present case, which DALLAS, C. J., said he could not, in principle, distinguish from the present.

Vaughan, Serjt., contra, endeavoured to mitigate the fraud, and to distinguish the case from *Hill v. Perrott*, observing that, in that case, the action was for goods sold and delivered; and contending that, in the *present case, [371] there was no money actually had and received.

DALLAS, C. J., I think that this rule ought to be discharged, and upon this plain ground, that the jury have found a fraud in the defendant, committed by him through the medium of Phillips. Nor can I distinguish between Phillips and the defendant in the prosecution of this fraudulent transaction, for Phillips stands in the light of agent to the defendant, throughout the whole contrivance. But it is not necessary to go that length, nor do I wish to come to any decision uncalled for by the case before the court. I confine myself, strictly, to this. Here was a sale of wines, the property of the plaintiffs, brought about by fraud and collusion, in which the defendant, who was to reap the benefit of such sale, was prime mover. Now, it is admitted, that a sale effected by fraud, works no change of property; the property, then, in this case, remained in the original owner, and therefore I hold the profits of the sale in the hands of the defendant, to be so much money had and received by him, to the use of the plaintiffs, who were the original proprietors. On this ground, I am of opinion, that this application must be dismissed.

PARK, J. This was a case of the most gross fraud, practised by the defendant on the plaintiffs, through the instrumentality of Phillips, and no violence will be necessary to bring it within the decided cases. *Hill v. Perrott* is not, in principle, to be distinguished from this case; and I have a manuscript note of an additional point which was ruled in the case of *Corking v. Jarrard*, 1 Campb. 37. *It appeared there, that a servant had received money [372] from her master, and applied it to the purposes of lottery insurance. Lord ELLENBOROUGH held, on the authority of *Clarke v. Shee*, Cowp. 197, that the master might recover the money back from the lottery office keeper, as money had and received.

BURROUGH, J., concurred.

Rule discharged. (a)

(a) Richardson, J., was absent.

WHITEHEAD v. HOWARD.

Declaration, that defendant, on consideration, &c., promised to invest plaintiff's money on good security: Breach, that he invested it on bad security; Pleas, general issue and statute of limitations: Replication, that defendant promised as above, within six years: Proof, that within that time defendant acknowledged the security to be bad, and promised that plaintiff should be paid: Held, that plaintiff could not recover, the declaration stating no debt to which the subsequent promise could be applied.

Held, also, that the defendant was not liable on a count upon an account stated; nor on a count for money had and received, as having received money for one purpose and applied it to another.

ASSUMPTION. The first count stated, that, in consideration the plaintiff would employ defendant, &c., defendant undertook to invest certain moneys of plaintiff's in good, valid, and sufficient security. Breach, that the defendant invested plaintiff's money in bad security. There were other counts varying the statement, the usual money counts, and a count on an account stated. Pleas, general issue and statute of limitations. Replication, "That defendant did, within six years next before the commencement of this suit, undertake and promise in manner and form as the plaintiff hath above thereof complained against him."

*At the trial, before DALLAS, C. J., Middlesex sittings after Trinity term last, it was proved, that the plaintiff, in 1808, had employed the defendant to invest money for him by way of annuity; that part of the security proposed by the defendant, consisted of some copyhold premises, supposed to belong to one Alston; that the defendant never inspected the rolls of the manor in which the copyhold was situate; that though, in fact, Alston possessed no such copyhold, the plaintiff's money was made over to Alston, who granted an annuity for it, which was paid by the hands of the defendant, till 1814, when Alston became bankrupt; that, at the time of the transaction, the plaintiff's two sons were clerks in the defendant's office, were in some degree consulted by the plaintiff, and might, if they had thought fit, have inspected the rolls of the manor; that, upon Alston's bankruptcy, and the state of the security being discovered, Gibbs, the defendant's managing clerk, promised that the plaintiff should be paid, which promise was afterwards recognised and confirmed by the defendant.

The jury found a verdict for the plaintiff, the learned judge reserving it to the defendant to move to set aside the verdict, and enter a nonsuit. Accordingly,

Vaughan, Serjt., having obtained a rule to that effect,

Lens and Pell, Serjts., for the plaintiff, admitted, that there might be some difficulty as to the special count, or the subsequent promise, after the decision in *Short v. M'Carthy*, 3 B. & A. 626; but, at all events, the money might be recovered, on the count for money had and received, on the ground that when a party receives money for one purpose and applies it to another, the party furnishing the money may call for it again, in consequence of his *instructions not having been pursued. Here, the defendant received the money, [*374 for the purpose of investing it in good security; but, disobeying such instruction, he chose to invest it in bad security; and after this misapplication, the plaintiff could only consider the defendant as having, at least, received the money to the plaintiff's use. [DALLAS, C. J. You must make out that the defendant received the money; whereas it was transferred to Alston, and the annuity actually paid for some time.] It was very probable, from the evidence, that Alston's name was only colourably introduced, and that he never, in fact, received the money. The annuity was never, in fact, paid by him to the plaintiff, but only an account kept up in the defendant's books; and this, coupled with the defendant's expressions, must certainly entitle the plaintiff to recover on the count upon an account stated.

Vaughan, Serjt., contrà, was stopped by the court.

DALLAS, C. J. I am of opinion, that, in this case, a nonsuit must be entered. I shall first consider the case as it stands upon the facts, and those facts I shall first view, without reference to the manner in which the action is framed. It appears, then, that Howard, who carried on the business of negotiating annuities, was employed by Alston, to raise a sum of money upon annuity security. Howard applied to the plaintiff, or the plaintiff to Howard, one or the other. It is immaterial which; but the material fact is, that Howard represented part of the security to consist of a copyhold estate, which he said Alston possessed, but which, it turned out, Alston, at that time, did not possess; Howard having made no search or inquiry one way or the other. It is necessary to observe here, that the plaintiff did not repose his confidence in Howard alone; he confided also in *his own sons; they might have made a search if they had thought it fit, and there was a negligence in their not doing so. It does [*375 not appear that there is any thing in the facts of the case, which would warrant us in saying, that there was any fraud on the part of Howard; but clearly there was gross negligence. Supposing, then, an action to have been brought against Howard, on the ground of his not exercising a proper degree of care in his business, in such an action, properly framed, the plaintiff might certainly have

recovered. This action is not so brought, but is framed on the footing of an express undertaking having been given by Howard, for the validity and sufficiency of the security in question. Here, it appears, the defendant's liability on such an undertaking, is barred by the statute of limitations, unless a subsequent promise can be established; and, if so, the first question would be, whether the liability of the defendant can be revived by any subsequent promise to pay a debt, with which he was not originally chargeable; and, upon this head, there can be no ground for doubt, the debt originally not being any debt of Howard's. To revive a debt by promise, and take a case out of the statute, there must be an antecedent debt; and if a promise should be made, where there is no antecedent debt, it would be necessary to frame a special declaration on such a promise. Confining myself, then, for the present, to what appears in the special count of the declaration before me, it seems to me, that this case is decided by that of *Short v. M'Carthy*. The facts of that case were, that in December, 1812, the plaintiff having agreed to give a Mrs. Shaun 340*l.* for her interest in 700*l.* bank annuities, applied to the defendant, who was an attorney, for the purpose of having the bargain carried into effect. The instructions given, were, that the defendant should see that every thing was right. The deeds were accordingly *prepared and executed at the time, and the [376] money was then paid by the plaintiff. It subsequently turned out, that no inquiries had been made at the Bank of England, and that there was no such stock to which Mrs. Shaun was entitled; this discovery was made in August, 1818. So far the two cases are similar. Here, the defendant omitted to search the rolls of the manor; there, he neglected to search the books of the bank. The action against the defendant in that case, having been commenced subsequently to 1818, he pleaded that the cause of action did not accrue within six years, and it was held, that the plaintiff was entitled to recover. Then follows that which makes the two cases exactly agree. "The defendant, on being applied to," (in August, 1818) "said that it was owing to an omission of his clerk, and that he was responsible." The court held, that there could be no recovery on this subsequent acknowledgment, except under a declaration framed for the express purpose. Admitting, then, the negligence of the defendant here, in not having searched the rolls of the manor, and admitting his having made an absolute promise to pay, (which I think a little questionable, but the jury having so found it, we must take it to be an absolute promise,) *Short v. M'Carthy* is precisely in point to show, that, upon a special count such as the present, the plaintiff cannot recover. This brings me to the count for money had and received, and there is no foundation whatever for the plaintiff's recovering on that count.

It is urged, that the plaintiff may recover on this count, because the consideration having totally or partially failed, by the failure of the security and the annuity ceasing to be paid, the plaintiff's money must be deemed to have been had and received by the defendant to the plaintiff's use. With respect to that, if there were any foundation for so contending, the *argument [377] would have been used in *Short v. M'Carthy*; but it never occurred to the counsel there, to turn round and say, that on the consideration failing, the broker could be deemed to have received the money, which, in fact, went to his employer. Is this, then, money had and received by Howard to the use of the plaintiff? If an action had been brought against Alston, on the ground of the consideration failing, he would have been bound to pay, and that alone might be an answer to the question, whether Howard had received this money to the use of the plaintiff. So to construe it, would be to extend the doctrine of money had and received, infinitely beyond all bounds, within which it has hitherto been confined. It may be admitted, that, if this were a mere colourable transaction, and Alston had never received the money, it might be placed on the footing of money had and received; but what are the facts? the money was to

be paid over to Alston ; it was actually paid over, and Alston continued to pay the annuity till he became bankrupt. Can it be said that Howard, because he was guilty of negligence, became the party who granted the annuity, who received the consideration for it, and paid the annuity ? If he received the money at all, he received it to the use of Alston ; and here, the plaintiff has not only been paid on account of the annuity by Alston, but has proved the debt under his commission. There is no pretence for saying that any ground exists for the plaintiff's recovering on the count for money had and received ; and as little is there for saying he ought to recover upon the account stated. A party can only recover upon a count on an account stated, where a debt actually exists. Here, there was no debt from Howard, who only negotiated between the plaintiff and Alston. I am, therefore, bound to adhere to the opinion which I formed at the trial.

*PARK, J. I am of the same opinion, though some difficulty was raised at first, by the apparent hardship of the case. We must take [378] care, however, that such appearances do not lead us to decide contrary to what is law. There being no special count as to any revival of an old debt, we must assume that this was an absolute promise, and then the case is not distinguishable from that of *Short v. M'Carthy*. I am not aware of any case where the doctrine of a revival, after the operation of the statute of limitations, has applied to any thing but an actual debt. Here, there was no debt contracted by the defendant, but he was guilty of gross negligence. The great point was, to show that this was money had and received by the defendant to the use of the plaintiff, and it was dexterously argued, that it was doubtful, from the evidence, whether Alston ever had the money at all, and that, therefore, the introduction of his name by the defendant, might have been merely colourable ; but as no fraud was found by the jury, it would be too much to assume this, after the lapse of so long a period. As to the count on an account stated, a debt must have existed, to render that count available. I think, therefore, that a nonsuit must be entered.

BURROUGH, J. The only action proper in this case, would have been an action for negligence, but the time for that has long gone by, and contracts of this sort are not capable of being revived by any subsequent promise. An action for money had and received will not lie against a person who immediately pays the money over under the directions of the plaintiff ; and it is clear, from the circumstance of the annuity having been paid six years, that this money was paid by the plaintiff, in order to its being immediately paid over to the grantor of the annuity ; then, in order to recover on a count for an account stated, there must be an existing debt. I *am further of opinion, in this case, that there [379] was no absolute promise to pay, on the part of the defendant, but a promise to pay, contingently, on the event of Alston's effects turning out insufficient ; and what was said by the defendant subsequently, must have had reference to this contingent promise.

Rule absolute. (a)

(a) Richardson, J., was absent.

IN THE EXCHEQUER CHAMBER.

**ANDREW DAVIDSON, WILLIAM JONES, and WILLIAM JENNER,
v. THOMAS CASE.**

Ship and freight were insured by separate sets of underwriters. The ship (a general seeking ship) was captured; and ship and freight were abandoned to the respective underwriters, who each paid a total loss. The ship, being recaptured, performed her voyage and earned freight: Held, that the underwriter on ship was entitled to the freight.

Abandonment of ship to the underwriter on ship includes freight, and transfers freight earned subsequently to the abandonment to such underwriter, as incident to the ship.

ASSUMPSIT by the defendant in error for money had and received, and the other usual money counts, to which the plaintiffs in error pleaded the general issue. At the trial before Lord ELLENBOROUGH, C. J., at Guildhall, at the sittings in Trinity term, 1815, the jury found a verdict for the defendant in error for 71*l.* 12*s.* 10*d.* damages, subject to the opinion of the Court of K. B. upon the following case:

Messrs. Brosterston and Begg were the owners of the vessel called The Fanny; she was a general seeking ship, and sailed on a voyage from Rio de Janeiro to Liverpool with a cargo of goods on freight, the property of *different persons. On the 27th January, 1814, the owners insured the vessel on the said voyage, valued at 7000*l.*; and on the 22d April following, they insured the freight of the said voyage by other policies, and with other underwriters, and valued the same at 4000*l.* The vessel with the goods on board in the course of the said voyage was captured by an American privateer: the owners thereupon gave notice of abandonment at the same time to the respective underwriters on ship and on freight, who severally accepted the same. The vessel was afterwards recaptured by one of his majesty's ships of war, was brought into London, and was, by decree of the high court of Admiralty, restored to the owners with the cargo, on payment of salvage and expenses. The vessel arrived at Liverpool, delivered her cargo, and earned her freight. An agreement was entered into between the owners of the vessel and the underwriters on ship, but not by the underwriters on freight, that the defendants (plaintiffs in error,) should sell the vessel and receive the produce thereof, and should also receive the freight of the cargo for the use and benefit of all persons who should legally be entitled thereto respectively. The underwriters on ship and freight severally paid or satisfied the owners of the ship for a total loss of 100 per cent. on the valuation on both ship and freight. The defendants received and paid to the underwriters on ship the amount produced by the sale of the vessel, which was about 33*l.* per cent. on their subscriptions. The underwriters on ship paid the loss on ship, before the underwriters on freight paid the loss on freight. The defendants received the freight of the goods, which they hold under the terms of the agreement, and which is 35*l.* 16*s.* 5*d.* per cent., clear, on the sum insured on the ship. The underwriters on ship, and also the underwriters on freight, severally claimed from the defendants the freight so received. The *plaintiff (defendant in error) is an underwriter on ship to the amount of 200*l.*, and claims to recover, as such underwriter on ship, a proportion of the money so received by defendants for freight.

The question for the opinion of the court is, whether the plaintiff (defendant in error) is entitled to recover. If he be entitled, the verdict to stand; if not, a nonsuit to be entered.

The case was argued in Easter term, 56 Geo. 3, when the Court of K. B. gave judgment for the defendant in error, 5 M. and S. 79; but, by consent, it was ordered that the special case should be turned into a special verdict, for the

purpose of obtaining the opinion of the Court of Exchequer Chamber upon a writ of error. This was accordingly done; and the special verdict was in substance the same with the special case. The case came on to be argued in Trinity term last, when,

For the plaintiff in error, it was contended by *Littledale*, that as, in this country at least, freight might legally be the object of an insurance separate from the insurance on the ship, the law of this country would apply to insurance on freight the same incidents, as it applied to any other species of insurance. If, therefore, by abandonment, the insurer on the ship became entitled to the ship, there was no reason why the insurer on freight should not by abandonment become entitled to the freight; nor could there be any difficulty in apportioning to each insurer that to which he was entitled. The insurer on ship ought not, by an abandonment, to gain more than the subject of his insurance, namely, the hull, tackle, and apparel of the ship. It would be unjust, if by the abandonment he were to acquire the freight, which had never been the object of his insurance. The difficulty ^{*had} arisen from supposing, that under an abandonment a ship passed precisely in the same manner as under a ^[*382] sale. Under the sale of a ship, if nothing was said to the contrary, the freight would pass: but the cases were in reality very different; for, in the case of a sale, and especially in the sale of a ship at sea, the freight about to be earned was part of the property for which the purchaser expressly paid his money: it was, in fact, the chief object of his contract; whereas, in the case of an abandonment, there being at the time of the abandonment no contract, no particular object of stipulation, the abandonee could only take that for the loss of which he had paid by his insurance. If, therefore, he had only paid for the loss of the body of the ship, why should he gain more by the result of an abandonment, and gain it to the loss of another insurer, who seemed to have the same claim to recover the object of his distinct insurance. Where the second insurer had such a separate claim, the abandoner could not transfer to the first any thing more, than the thing insured. The underwriter on ship had no more right to complain that he was deprived of freight under such circumstances, than a purchaser excluded from it by express agreement. It must, however, be contended, that if the argument were correct, the owner of a ship who had not insured freight was, as well as an insurer on freight, entitled to the freight, after he had abandoned the ship to the insurer on ship; and this seemed to be the opinion of the lord chancellor, in *Mestaer v. Gilliespie*, 11 Ves. jun. 621. The question could only be argued on principle, as the cases were decided each on its own peculiar circumstances.

Scarlett, contrd. No distinction can be drawn between an assignment of the ship and an abandonment. ^{*An abandonment, where the ship re-} ^[*383] appears, is always followed up by a regular assignment: under an assignment, the freight passes to the assignee, *Chinnery v. Blackburne*, 1 H. Bl. 117; *Splidt v. Bowles*, 10 East, 279. It is as much incident to a ship as rent to a house; and this principle has been pushed to a rigorous extent. *Camden v. Anderson*, 5 T. R. 709; *Morrison v. Parsons*, 2 Taunt. 407. Even where the ship is chartered, and the assignee cannot, by reason of a technical rule of law, sue in his own name, payment of the freight to him will be good. The law being such, it is no hardship on the insurer on freight; for every man who enters into a contract is supposed to know all the consequences of it; and the inconvenience of a different rule is very obvious. Suppose insurance of ship by one, and of freight by another: the ship is captured, and the owner abandons. If the insurer on ship obtains her by recapture, is he bound to pursue the same voyage, in order that the insurer on freight may obtain the benefit of an abandonment of freight? And yet this and many such difficulties must occur, if it be once held that the right to freight does not in all cases follow the ship. But further, abandonment can only be of that which is material, tangible,

and capable of being taken possession of by the abandonee. Right to freight is no more than right to the performance of a contract; a thing intangible, and existing in idea only, and, as a chose in action, not transferable by the law of England. It is clear, therefore, that the plaintiff in error cannot support his claim on principle; and the cases are all against him. *Thompson v. Rowcroft*, 4 East, 34; *Leatham v. Terry*, 3 B. & P. 479; *M'Carthy v. Abel*, 5 East, 388; *Sharp v. Gladstone*, 7 East, 24; *Splidt v. Bowles*.

*^{384]} *Littledale* was then heard in reply. And now,
DALLAS, C. J., delivered the judgment of the court. This case comes before the court on error from the King's Bench; and it will not be necessary to state the facts in detail, as they will be found fully and accurately set forth in the printed report of what passed on the original hearing. It will be sufficient to observe, that there having been two separate insurances, the one on ship and the other on freight, and the ship having been captured in the course of the voyage, and recaptured, and having ultimately earned freight, and there having been an abandonment of ship to the underwriters on ship, and of freight to the underwriters on freight, the question arises, whether, upon such abandonments, the abandonment of ship includes freight, or whether the underwriters on freight are entitled thereto as having insured the freight specifically, and having from the assured an abandonment of such freight, under the insurance so made?

This question, long depending, but always avoided, because in former cases not necessary to be decided, has at last been determined by that court, from whose judgment error is now brought, three of the learned judges having been of opinion that an abandonment of ship included freight, and a different opinion having been declared by Mr. Justice *BAYLEY*, who considered that an abandonment of freight carried with it such freight, as a subject separate and distinct from ship, under and with reference to contracts of insurance.

It would be an idle parade and waste of time to go into the subject at large, fully treated of, as it is, in all the elementary works on insurance law; and more particularly as the printed report, to which I have already alluded, contains all, in point of authority and observation, that can properly belong to the question.

*^{385]} I shall, therefore, merely advert to the general grounds on which the argument has proceeded, and on which the decision must now depend.

And, first, it is not denied that, generally speaking, an assignment of ship includes freight. But, it is said that it does so, because such is the natural effect and consequence of such assignment, and that there is no agreement between the parties to the contrary; whereas, in cases of abandonment under insurance, such agreement is to be implied from the practice of making separate insurances, which the law of this country (different, in this respect, from the law of other countries,) permits; and that the law will, therefore, keep the interest of the parties separate and distinct, giving to the underwriter on ship the ship abandoned, and the freight to the underwriter on freight.

That this practice has prevailed is undoubtedly true; but it is a fallacy to confound the fact of such practice with the legal effect of it, for it is the practice itself that raises the legal question. To make the practice decisive of the law, it would be necessary to go further, and to show a practice of settling losses, in conformity to the underwriters on ship having never claimed the freight, and the underwriters on freight having constantly received it. Such a practice, if of sufficient prevalence and notoriety to raise the presumption of general knowledge, would show the understanding of parties, with reference to which they must be taken to deal; and would therefore form the contract between those who were respectively privy to it. But it was admitted in the argument in the court below, adverted to from the bench, and has again been admitted in the argument here, that there has been no such practice; but that, on the contrary, the question has rested altogether hitherto in controversy, the

underwriters on ship having, in every instance, resisted the claim of the underwriters on freight, asserting the freight to belong to themselves as owners of the ship by the abandonment made. That there has been any actual agreement to the contrary, in this case, is not pretended; and it seems to follow of course, that from the mere practice of insuring separately, no such agreement can be implied when the practice stops with the fact of so insuring, and the effect of such fact has constantly been matter of dispute. And I have dwelt on this the more, because I observe, in the court below, the argument was mainly rested on the ground that such an agreement was to be implied, which I think it cannot be, for the reasons given.

There being, then, no actual or implied agreement between the two sets of insurers, what, in point of law, is the effect of the contract into which they have respectively entered? And, I say the two sets of insurers; because it is not necessary to consider the consequence of a separate insurance and abandonment of freight between the insurers on freight and the assured, under all circumstances that might possibly arise on the contract directly made between them. Confining, therefore, the consideration, in the manner stated, what is the legal operation of the respective contracts? And, in resolving this question, I put no stress upon the fact, that freight passes under a general assignment of ship; because it appears to me that this is begging the question, the question arising on a supposed distinction resting upon abandonment as different from common transfer. The effect of it, correctly considered, is only to remit the question to the general operation of law, supposing the distinction contended for to fail. Nor do I place reliance on the assignee of the ship becoming the owner of her in a common case; for here, again, the question turns upon the asserted distinction. Neither do I give weight to the mere fact of separate insurances; for this, also, would be to take the point for granted; *and they are not separate, but connected, if made under a general under-
standing that each shall refer to, and be regulated by, the other.

But the case to me, seems to result to this; if, in every other case of transfer, the freight follows the assignment of the ship, and if abandonment be but a different term for assignment, and the same in effect, unless modified to a different purpose by the agreement of parties; and if, in this case, so far from there being any such agreement, either actual or in fact, or in law to be implied, the contrary is to be presumed (the case only amounting to claim on one side, and resistance to such claim on the other,) the reason fails for taking this case out of the general law, and consequently, the underwriters on ship, under the abandonment to them of ship, are entitled to freight.

And, in so deciding, we shall not break in upon the general legal principle, by engraving upon it an anomaly of doubtful convenience; nor will the decision lead to any difficulty in future, as ship and freight may be made the subject of one and the same insurance; or, if there be any practical objection to this, of which I am not aware, the parties may contract with reference to the law as finally now settled, supposing the case to end here.

I will merely further state, that I have avoided going into much that has, on former occasions, been closely or loosely applied to the subject, having confined myself, for the reasons given, and which I will not repeat, to a single and general view of it.

In conclusion, I have only to add, that the judgment must be affirmed.

Judgment affirmed.

*388] *LLOYD, Assignee of WARWICK, a Bankrupt, v. HEATHCOTE.

1. An assessment for church and highway rates is a debt, and the assessor a creditor, under the bankrupt laws.
2. If a trader gives a general order to be denied to all comers, this is sufficient evidence of a beginning to keep house with intention to delay creditors.
3. A beginning to keep house with such intention, constitutes an act of bankruptcy, though no creditor is actually delayed.

THE defendant, sheriff of the county of Herts, having executed a *fieri facias* on the goods of Warwick, was sued by the plaintiff, in an action for money had and received; and the questions in the cause were, whether there had been a good petitioning creditor's debt against Warwick, and whether he had committed an act of bankruptcy; respecting which, the evidence before Wood, B., at the last Summer Hertfordshire assizes, was to this effect: A servant heard the bankrupt order his wife to say to any who called, that he was not at home, although at that time he was in his own house. Shortly afterwards, the collector of the church and highway rates called for the sum assessed on the bankrupt. The bankrupt had retreated into the garden, and his wife told the collector her husband was not at home; upon which, the collector departed.

It was objected, at the trial, that the collector of church and highway rates was not a creditor, and that therefore, a denial to see him, did not amount to a keeping house with intent to delay creditors. The learned judge having left it to the jury, to say, whether there was any debt due to the collector, and any denial, a verdict was found for the plaintiff.

Lens, Serjt., in the last term obtained a rule to set aside this verdict and have a new trial, when he contended, that the collector was not a creditor, because he could not have sued the bankrupt for the assessment which he came to collect; he had only a power to demand in the first instance, and in case the *389] *money were not paid, then to distrain under the statute, 53 Geo. 3, c. 127, s. 7; so that, at all events, as he was not entitled to take any step towards insuring payment at the time he called, the money could not be said to be fully due, till the provisions of the statute had been complied with; and the case was the same as that of a demand made on a bill of exchange, the day of payment on which had not arrived: this circumstance distinguished the case from that of *Jeffs v. Smith*, 2 Taunt. 401; 4 Taunt. 196, where the debt being for king's taxes, the attorney-general might have sued instantly, or the money have been levied by seizure, without any interval of ten days.

If the collector had no means of enforcing payment the day he called, he could not be deemed a creditor on that day; and then the denial of the bankrupt did not afford any evidence of a keeping house, with intent to delay a creditor, though it might be admitted, that if any such intention had been proved, the act of bankruptcy would have been clear.

Taddy, Serjt., now showed cause against the rule; and the court having intimated an opinion, that there appeared on the part of Warwick, a sufficient *absenting* himself to constitute an act of bankruptcy, *Lens* endeavoured to distinguish the cases cited on that head; but, on its appearing that the evidence had not been sifted to that point at the trial, but only as to Warwick's *keeping house* with intent to delay creditors, *Taddy*, on the latter head, argued first, that the assessment demanded by the collector was a debt due, for which the collector was clearly a creditor; that the statutes regarding bankrupts did not make any distinction between debts suable by action at law, and debts not so suable; that the directions appointed by act of *Parliament, to be pursued by the collector, for the recovery of sums due for rates, did not so affect the nature of those rates as to render them any thing other than a debt, from the moment of the assessment; and that, therefore, the case was not, in

substance, distinguishable from that of *Jeff's v. Smith*. Secondly, admitting that the rates did not constitute a debt, that the collector was no creditor, and that, therefore, no creditor had been delayed on the occasion in question; still there was a keeping house, and a manifest intention to delay creditors, which two circumstances constituted an act of bankruptcy, even though no creditor had called, or had been, in fact, delayed; and for this he cited *Dudley v. Vaughan*, 1 Campb. 271; *Bayly v. Schofield*, 1 M. and S. 338; *Robertson v. Liddell*, 9 East, 487.

Lens having spoken in support of his rule, the court gave judgment.

DALLAS, C. J. A denial to a creditor does not, of itself, constitute an act of bankruptcy, but is only evidence of a beginning to keep house, which, if accompanied with an intention to delay creditors, is indisputably an act of bankruptcy; and therefore it was properly admitted in argument, that if the denial had been given with any such intent, the keeping house would have amounted to an act of bankruptcy. The learned judge, at the trial, stating the collector to be a creditor, the jury found, in effect, that such a beginning to keep house had taken place, and therefore the case is now reduced to this, whether the collector was a creditor: that is, whether he was in a situation to demand a debt. I shall confine myself to the point adverted to by the learned *judge at [391] the trial, although if it were necessary to recur to the other point, the court might be inclined to hold, that, upon the evidence before them, there appeared, on the part of the bankrupt, a sufficient absenting himself to constitute an act of bankruptcy. But I avoid giving any determination on that point. In this case, then, the order to deny must have been, in effect, an order to deny to creditors, because the order is general, to deny to all persons; and if it were necessary, a case might be cited to that effect. Here, it is contended, there was no creditor, because the collector could not sue, by action, for his debt. But the argument contains a fallacy, when it assumes, that a debt cannot exist, unless where the debtor is suable in the ordinary way.

Here the debt is created by an assessment, and when that assessment is made, the debt is due and demandable. It seems to me, therefore, that, in this case, there was a debt due upon the assessment,—a denial, which could only have been made with a view to postpone the creditor's remedy,—and that the creditor's remedy was, in fact, postponed, (if it be deemed necessary to show that:) because, if the collector believed what was told him, he would not recur to any remedies to which he might have resorted had he conceived the bankrupt to have been at home and denied. This, therefore, was a calling by a creditor, who came within the general order to deny: and even putting the case of this creditor aside, the general order to deny the bankrupt to all creditors, and the beginning to keep house, clearly amount to an act of bankruptcy.

PARK, J. I am of the same opinion, and confining myself to one ground, think this was clearly a beginning to keep house. There is a great confusion in the text books on this point; it is continually laid down, that a denial to creditors is an act of bankruptcy. It is *no such thing; it is only evidence of such an act, which may be evidenced in many ways. Lord ELLENBOROUGH has put the case of a man shutting himself up in his bed-room for a fortnight, and giving orders to be denied to all comers. That is a beginning to keep house, and an act of bankruptcy, though no one should call. Certainly a denial is usually relied on as evidence of the act of bankruptcy, *Garret v. Moule*, 5 T. R. 575, but it is as certainly, of itself, an equivocal act, and open to explanation; as where a man is denied only because he is attending upon a sick child, or engaged at dinner. Lord ELLENBOROUGH points to this in *Robertson v. Liddell*, and again, in *Dudley v. Vaughan*. Looking, then, at the real principle of the cases, which rests on a beginning to keep house with intent to delay creditors, the question comes to this,—was there evidence of such a beginning to keep house in the present instance? I think there was, and

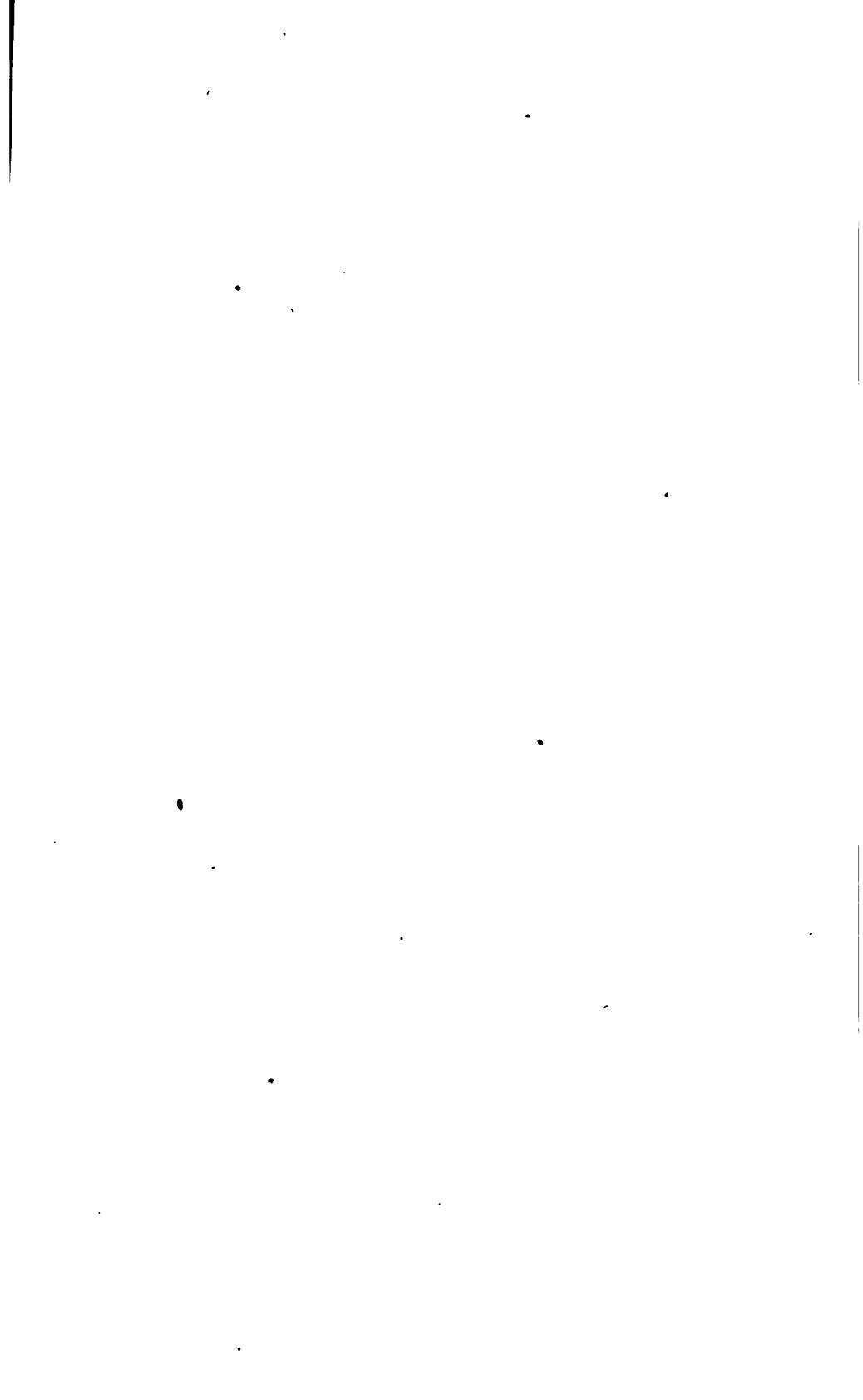
that, therefore, independently of the debt or remedy for it, this was an act of bankruptcy.

BURROUGH, J. In *Garret v. Moule* I determined by an award, that, in order to complete an act of bankruptcy, the debtor must be actually denied to a creditor, with intent to defraud or hinder that creditor, and that keeping house with that intent was not alone sufficient; and so it was held by the court, on motion to set aside the award. This doctrine was afterwards doubted; and it was held, that in reading the words of the statute, "to the intent or whereby," the word "or" should be construed as disjunctive; and that a beginning to keep house with intent to delay creditors was a sufficient act of bankruptcy, though no creditor was actually delayed. And this was so held, because such an act *393] often rests only in the knowledge of *the bankrupt and his family, and the creditor has no means of discovering it. The beginning to keep house is only put as an instance in the act, and there are various other ways in which a debtor may exhibit an intention to delay creditors, which would equally amount to an act of bankruptcy; as, by shutting himself up in a box, if it were done with intent to delay. As to the debt in this case, it is the duty of the inhabitants of a district to repair their roads; the poor contribute their labour, the rich their money; and though the rate on the rich is not exactly the same as a debt for goods sold, it is in the nature of a debt, and it is not material whether it is suable or not. If any remedy at all is given, the thing is just the same as if the debt were suable. The moment the assessment is made it becomes a debt; and that would suffice if it were necessary a creditor should have been actually delayed in this instance; but we need not go into that, because the keeping house is sufficient.

Rule discharged.(a)

(a) Richardson, J., was absent.

END OF MICHAELMAS TERM.



CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS
AND
OTHER COURTS,

IX

Hilary Term,

IN THE FIRST AND SECOND YEAR OF THE REIGN OF GEORGE IV.

BROWNE v. KNILL.

If, in covenant for non-repairing, the covenant contains an exception of "casualties by fire," it is fatal, on *non est factum*, if the covenant be stated in the declaration without such exception; and the court will refuse to permit the plaintiff to amend on paying the costs of the trial.

Covenant on a lease for not repairing the premises. The covenant was stated in the declaration to be, that the defendant "should and would at his the said defendant's costs or charges, well and sufficiently repair, uphold, support, maintain, paint, cleanse, amend and keep the said messuage, or tenement and premises, with the appurtenances, and every part thereof, and the walls, privies, drains, and cess-pools thereto belonging, in by and with all needful and necessary repairs, cleanings and amendments whatsoever, when, where, and so often as occasion should require." Plea *non est factum*. The lease produced in evidence contained the words above set forth, with the addition of the following qualification, "casualties by fire excepted." At the trial before DALLAS, C. J., it was objected for the defendant, that this variance was fatal, and DALLAS, C. J., nonsuited the plaintiff, citing the case of *Tempney v. Burnand*, 4 Campb. 20, as expressly in point.

Vaughan, Serjt., now moved to set aside this nonsuit, and have a new trial, urging that the qualification of the covenant need not be stated in pleading, unless it constituted a condition precedent; it was sufficient if the plaintiff disclosed enough to entitle him to recover. If the qualification constituted a condition subsequent, as it did here, it might be pleaded as matter of defence, but could not be taken advantage of on *non est factum*. He cited *Gordon v. Gordon*, 1 Starkie, N. P. C. 294, as overruling *Tempney v. Burnand*, and *Elliott v. Blake*, 1 Lev. 88, as in point, as also Com. Dig. tit. *Pleader*, C. 57, adding, that in actions against a carrier, it was never usual to state the limitation of their liability to 5*l.*, where the goods are not stated to be of greater value.

Sed per Curiam. You are bound to set out the covenant truly: the distinction is, whether the qualification forms part of the covenant or not: If it forms

part of the covenant, it must be set out, if not, it may be omitted; here it is part of the covenant which you state to *be an absolute covenant whereas [*397 it turns out to be qualified.

Rule refused.

Vaughan then prayed to be allowed on paying the costs of the trial, and cited *Halhead v. Abrahams*, 3 Taunt. 81, but the court refused this; PARK, J., asking, why the defendant was to be deprived of the benefit to which he had become entitled by the plaintiff's *laches*?

Vaughan took nothing by his motion.

TOMLINSON and Another v. JOHN WILKES, Esq.

An assignee of a bankrupt who has released his individual claims on the bankrupt's estate, is an admissible witness to prove the petitioning creditor's debt.

THIS was an action against the defendant, as sheriff of Essex, for a false return to a writ of *fieri facias*, issued by the plaintiffs on the 3d May, 1819, against the effects of James Shynn. At the trial of the cause before WOOD, B., at the last Chelmsford Summer assizes, the defence set up on the part of the sheriff was, that an act of bankruptcy had been committed by Shynn before the 3d May. In order to prove the petitioning creditor's debt, J. A. Bygrave, a creditor of Shynn, and one of the assignees under the commission, was called, and his competency being objected to by the counsel for the plaintiff, on the ground, that he was an assignee and interested, a release of the witness' individual claims on the estate of the bankrupt was put in. WOOD, B., held that this release made the witness competent; for that, as assignee of Shynn's estate, he was not *interested. The learned judge, however, saved the point. [*398 The jury found a verdict for the defendant.

Taddy, Serj., in the last term, having obtained a rule *nisi* to set aside this verdict and have a new trial, on the ground, that the witness Bygrave, whose evidence established the petitioning creditor's debt, was an interested witness,

Pell, Serj., now showed cause, and contended that Bygrave, having released his individual claims, stood in the situation of a mere trustee, and that no interest could possibly arise to him from the event of the cause.

Taddy, in support of his rule, urged that the sheriff here was a stakeholder, and that if he refused to deliver the proceeds of the levy, the verdict, in this case, might be given in evidence in an action against him by the assignees for retaining the same, which brought the case within the principle of the carrier's case, 1 Bull. N. P. 243.

Sed per Curiam. The witness, having released his claims as a creditor on the estate of the bankrupt, stood in the situation of a mere trustee whose trust was coupled with no personal interest: he was, therefore, an admissible witness. An executor, though he has duties to perform, is an admissible witness, *Phipps v. Pitcher*, 6 Taunt. 220; *Goodtitle v. Welford*, Doug. 134; and the case in Buller's *Nisi Prius* has no application.

Rule discharged.

*399]

*PEAKE v. CARRINGTON.

In an action against the master of a ship for penalties under the 34th section of the *pilot act*, the declaration must allege that the unlicensed pilot offered to the master to take charge of the ship; or, that such pilot offered to take such charge in the presence of the master; and it is not sufficient merely to follow the words of the section.

THIS was a *qui tam* action on the pilot act, 52 G. 3, c. 39, by the 34th section of which it is enacted, that "every master of any ship or vessel, who shall continue to act himself as pilot, or who shall continue any unlicensed person, or any licensed person, acting out of the limits for which he is qualified as a pilot, after any pilot licensed to act within the limits in which such ship or vessel shall then actually be shall have offered to take charge of the ship or vessel; and every person assuming or continuing in the charge or conduct of any ship or vessel, without being duly licensed to act within the limits in which such ship or vessel shall actually be, after any pilot, duly licensed and qualified to act in the premises, shall have offered to take charge of such ship or vessel; shall respectively forfeit, for every such offence, a sum not exceeding fifty pound, nor less than ten pounds." Plea, *nil debet*. At the trial, before ABBOTT, C. J., (Maidstone Summer assizes, 1820,) a verdict was found for the plaintiff, on the last count of the declaration, which stated, that "heretofore, &c., the defendant, being the master of a certain ship or vessel called The General Murray, did continue a certain unlicensed person, to wit, one William White, that is to say, did continue him in the pilotage of the said last-mentioned ship or vessel, to wit, from Margate Roads aforesaid to Gravesend aforesaid, after a pilot licensed to act within the limits in which the said last-mentioned ship or vessel then actually was, to wit, one Edmund Gibbs, had offered to take charge of the said last-mentioned ship or vessel, *contrary to the form

*400] of the statute in such case made and provided, whereby, and by force of the said statute, the said defendant had forfeited, for his last-mentioned offence, another large sum of money, to wit, &c.; and thereby, &c."

Bosanquet, Serjt., in the last term, had obtained a rule *nisi* to stay judgment in this case, on the ground, (among others) that the count in question contained nothing to connect the defendant with the supposed offence, there being (though the words of the act had been pursued) no allegation when or how the pilot offered, whether in the voyage stated, or in any other voyage: neither did it appear by the count, that the offer was ever made to the master, who was sought to be fixed with the penalty, or even within his hearing.

Taddy, Serjt. now showed cause against the rule. The plaintiff, in his declaration, has followed the very words of the act, which is all that he can be required to do. [RICHARDSON, J. There are many cases arising on acts of Parliament, in which something more than the general words of the act is necessary. In Etherington's case, 2 Leach, 670, S. C.; 2 East, P. C. 635. See stat. 23 Hen. 8, c. 1, s. 3; 1 Edw. 6, c. 12, s. 10, and 3 W. & M. c. 9, s. 1, (which was tried in Sussex, under a special commission) in an indictment for stealing in a dwelling house, persons being therein, it was stated that the prisoners, one watch, &c. (and other articles above the value of 40 shillings) of the goods and chattels of the persons then being in the dwelling house, and *being put in fear*, feloniously did steal, &c. It was moved, in arrest of judgment, that the prisoners were entitled to their clergy, on account of the defect as to the capital part of the charge, because it did not appear, with sufficient *certainty upon the record, that the persons alleged to be in the house were put in fear by the prisoners. And the judges finally agreed, that the prisoners were entitled to their clergy, though they at first inclined to think the indictment good, from its pursuing the words of the stat. 3 W. & M. BURROUGH, J. In *The King v. M'Gregor*, 3 B. & P. 106, it was held insufficient, in an indictment on

the 39 Geo. 3, c. 85, against a servant for embezzling money received on his master's account, to follow the words of the statute, and it was ruled, that there must be a positive allegation that the money was the property of the master, as in other cases of larceny.] It being stated that there was an offer, and that the defendant "did continue the unlicensed person," an acceptance of the offer by the defendant, and, consequently, the proposal to him must, necessarily, be inferred. [PARK, J. The master might have been on shore, and the offer might have been made in his absence. [In *The King v. Fuller*, 1 B. & P. 180, it was held sufficient, in an indictment on 37 Geo. 3, c. 7, to follow the words of the act, and to state, that the prisoner did maliciously endeavour to seduce M. L., he M. L. being a person serving his majesty; without averring that the prisoner knew M. L. to be a soldier.

Bosanquet, in support of his rule. *The King v. Fuller* does not apply; for, there, the person charged was stated to have done the whole of the act; the defendant here is not shown to have done any thing penal; and he cannot be charged with a penalty, till it is shown he had knowledge of the fact that the person employed was unlicensed.

DALLAS, C. J. The count of the declaration, on which the verdict in this case is taken, does not state the time *when the supposed offence was committed, nor that the offer was made to the master, who is sought to be charged with the penalties of the act; nor does it state to whom the offer was made. It does not appear by whom the unlicensed person was put in charge of the ship; and *non constat*, but that he was so put in charge by a mere stranger. Why should it not have been averred, that the offer was made to the master, so as to bring him within the purview of the act? It is undoubtedly insufficient, in many cases, to set out on the record the mere words of a penal act, without going further, and stating circumstances to connect the defendant with the alleged illegal transaction.

PARK, J., of the same opinion.

BURROUGH, J., I am of opinion, that this count is insufficient to fix the defendant with the penalty. There is nothing which connects the defendant with the alleged offence, but his having continued to employ an unlicensed person, which he might have done, without knowing that such person was unlicensed; as to the case of *The King v. Fuller*, the words "feloniously, maliciously, and advisedly," in that case, sufficiently connected the prisoner with the illegal transaction, and fixed him with the knowledge that M. L., whom he endeavoured to seduce, was a soldier.

RICHARDSON, J. I think that, in order to bring a defendant within the purview of this statute, it must appear, that the offer of the pilot was made to the defendant, or in his presence. A man is not to be fixed with a penalty for an act, which, for any thing that appears, may have been done in his absence.

Rule absolute.

*CHAD, Bart. v. TILSED.

[*403

A grant of wreck was made by Hen. 2, to the proprietors of certain lands on the coast, and confirmed by Hen. 8. The proprietors of those lands having, 40 years ago, with a view to reclaim sea mud, run an embankment across a small bay, which was used to be left almost dry at low water, and having ever since asserted, without opposition, an exclusive right to the soil of the bay, though the bank was forced by tempest: Held, that such usage was evidence whence anterior usage might be presumed, which, coupled with the general terms of the grant, served to elucidate it, and to establish the right so asserted.

Trespass quare clausum fregit. Pleas, first, general issue; second, leave and license; third, that the *locus in quo* was part of Poole harbour; fourth, that the *locus in quo* was an arm of the sea, and that the defendant entered

there to fish, as he lawfully might. The replication traversed these pleas : the rejoinder took issue on the replication. At the trial before GRAHAM, B., Dorchester Summer assizes, 1820, the plaintiff, who was proprietor of Brownsea, an island of about 1000 acres, lying within the ambit of Poole harbour, deduced title to the island, including the *locus in quo*, from the Sturt family and the Abbot of Cerne. A grant of wreck from Henry the Second, in the first year of his reign, 1154, to the Abbot of Cerne, confirmed by *inspeximus* in the first year of Henry the Eighth, was proved ; also, a grant from Henry the Eighth, in the 36th year of his reign, to the Earl of Oxford, of the island of Brownsea, and a grant of the same year from the Earl of Oxford to Richard Duke of the same island, with wreck of the sea. At one extremity of the island is a bay of about 60 acres, called St. Andrew's Bay, which, at low water, becomes a great expanse of uncovered mud, intersected by a small inlet or gully only a few feet wide, called, in the language of the country, a lake. In this lake there is about three or four feet water at low tide, and about the same depth over the adjacent mud at high tide. About forty years ago, Mr. Sturt, at a great expense, constructed an embankment all across the chord of St. Andrew's Bay, with a view to reclaim the mud and bring it into cultivation, and frequently made use of the sea-weed, and mud and gravel, which was within the bank.

*404] The bay is about a mile and a half from Poole, in full *view of the town ; and no opposition was ever made to Mr. Sturt's undertaking. The bank was afterwards forced by a storm, and the sea again entered the space within, at high tide. Mr. Sturt, however, always treated it as his exclusive property ; and no fisherman or other person was permitted to remain in the gully or lake, until Mr. Sturt's consent had been obtained. Repeated assertion of property, on his part, was proved ; and uniform acquiescence therein, as also collection of wreck in St. Andrew's Bay, and application of it to his own use. It was admitted that St. Andrew's Bay formed no part of the harbour of Poole, and that vessels of any burden could never float there.

The case on the part of the defendant, who had insisted on fishing in the lake or gully within the artificial embankment, consisted of two grants of the *locus in quo* : the first to the Duke of Richmond, for 31 years, in the 13th year of Charles the second ; the second to Robert Gifford, for 41 years, in the 17th year of the same reign, (wherein the spot in question was described as waste land, and ooze and ooze lands, the grantee having covenanted to endeavour to reclaim and bring it into cultivation within seven years,) and of an attempt to prove that the *locus in quo* had, previously to Mr. Sturt's time, been commonly fished on ; as also afterwards, in defiance of his assertion of property. This, however, was not satisfactorily established ; and it appearing that nothing had ever been done under the grants of Charles the Second, the jury, without allowing the learned baron to conclude his summing up, found a verdict for the plaintiff.

Lens, Serjt., in the last term had obtained a rule *nisi* for a new trial, chiefly on the ground that the soil between high and low water-mark was vested in *405] the crown, and so open to the public, and that a mere grant of wreck did not convey any right to the soil : that the grants in the time of Charles the Second were utterly inconsistent with any such supposed right in the owners of Brownsea ; for, if the soil of St. Andrew's Bay had belonged to them, the crown never would have granted it to the Earl of Oxford : that, even if the grant of wreck could give any right to the soil of the shore, by the "shore" must be understood a certain space following the arc of the bay, upon which, indeed, a vessel might be wrecked, and not the soil of the centre of the bay, where, at high tides, vessels could not easily be lost : that if the law were thus, Mr. Sturt's acts were only acts of usurpation ; and usage of forty years, founded on usurpation, could not confer a right. It was urged, also, that perhaps the corporation of Poole might have been in confederacy with Mr. Sturt,

and that such a contrivance ought not to deprive the fishermen of their right to fish over the *locus in quo*. He cited *Vooght v. Winch*, 2 B. & A. 662.

Pell, Serjt., *contra*, insisted that what Mr. Sturt had done forty years ago, openly and unopposed, together with his subsequent assertion of property so uniformly acquiesced in, though not of themselves constituting any right, were evidence from whence anterior usage and anterior assertion of right might be presumed; that such anterior usage must be so ancient as to afford the best interpretation of the nature of the original grant; and that a prescription of such antiquity, coupled with the general grant, was quite conclusive as to the plaintiff's right.

Lens, having been heard in support of his rule, the court now gave judgment.

**DALLAS*, C. J. I agree that cases of this sort may rest on one or both of the two following grounds, that is to say, on grant, or on usage which presupposes a grant: I agree also, that in the case of a grant, no usage, however long, can countervail the clear words of the instrument, for what is done under usurpation cannot constitute a legal usage: but, it is equally clear, that when a grant of remote antiquity contains general words, the best exposition of such a grant is long usage under it. Unless, therefore, the usage of forty years ago can be proved to have originated in usurpation, it is evidence, whence usage anterior to that time may be presumed: and such a length of modern usage, connected with the ancient usage, affords the strongest exposition of the meaning of the original grant. The rule laid down in a book of authority on this subject is, "If the language of an ancient grant be obscure or doubtful, constant usage may be resorted to, to expound, though not to control the deed;" and the uniform course of modern authorities shows, that however general the grant, usage may afford a true construction of it, reducing this question to a question of fact, namely, what was the usage here? I agree that if the usage be only of forty years' duration, and be applied to establish an exclusive right over an arm of the sea, this could not destroy the right of the subject, but we must look to the way in which this modern usage arose, and that is as strong as possible to establish the plaintiff's claim; his predecessor raises a bank in the face of the whole town of Poole, and, according to the pleas, in a place which was part of the harbour in which all the inhabitants of the town had an interest. This was done at considerable expense, and occupied a great length of time. After the bank had been broken down, there was no interruption of the plaintiff's assertion of his claim: permission to enter within the bank was constantly asked, and given or refused as to the proprietor seemed fit. The usage was as strong as it possibly could be under such circumstances. But it was asked,—if the corporation of Poole had been in confederacy with the then proprietor of the island, and did not choose to sue upon this usurpation, should a poor fisherman by such means be deprived of his right? Certainly not. However, if so general a right had existed, it may be presumed any usurpation on that right would have been resisted. And why are we to presume any such confederacy between the owner of the island and the corporation of Poole? I have said, that where the words of a grant are general, they must be explained by usage. The grant of Henry the Second, conveys the island of Brownsea, and its shores; What then are its shores?—what usage has pointed out. And if I find the usage such as existed here, how can I resist the evidence? It is urged, that this is only a grant of wreck, but wreck must rest on the soil, usage must determine what has been deemed soil, and vessels of burden could at no time float over the mud in question. The lakes which have been mentioned, were only such small inlets as every where intersect the shore. The grants of Charles the Second confirm this usage, inasmuch as those grants were never acted on or acquiesced in by the owner of the island. I think, therefore, the question has been properly disposed of, and that a new trial cannot be granted.

PARK, J. If the grants in question contained any thing inconsistent with the usage established, the case might be different, but, the grant consisting of general words, we are driven to inquire what has been the usage under it. That is all one way, and it is reasonable to suppose it was the same in ancient times as at present. Nothing in the present decision will conflict with that of **408] Voight v. Winch*, which only decided that, in a public *navigable river, twenty years' possession of the water at a given level is not conclusive as to the right.

BURROUGH, J. The verdict in this case is not contrary to the legal effect of the evidence, but serves to confirm the construction put on the grants. The first contains a grant of wreck to the abbey of Cerne, throughout all their lands upon the sea, which shows they had other lands besides the main-land of Brownsea; now what could these other lands be but the land in question? As to the grants produced by the defendant, deeds produced by a party avail him nothing, unless the possession has gone consistently with them: Here, the parties who received the first grant from Charles the Second, did nothing under it; then other adventurers came forward, who also failed to make any attempt conformable to their grant. For what reason did both these parties, who thought it beneficial to take the grant, abstain from acting under it, but because they found a person in possession under a former grant? Then, the assertions of right on the part of the plaintiff are strong beyond all measure; and though the erection of the bank forty years ago would not of itself confer a title, yet, from such erection unopposed and the subsequent uniform usage, prior usage to the same effect may be presumed, which coupled with the general terms of the grant, establish the plaintiff's claim beyond dispute.

RICHARDSON, J. The evidence of assertion of right on the part of the plaintiff and those under whom he claims is indeed abundantly strong; however, I should agree that the legal effect of this evidence would not invest him with a title, and that the whole might amount to nothing more than usurpation, if it were quite clear that, prior to the construction of the embankment forty **409]* years ago, the public had any right over the *locus in quo*. But in this case as in every other, modern usage of forty years' duration is evidence not only for that period, but evidence from which it may be presumed, that the same course was pursued in earlier times, if nothing is shown to the contrary. Here there was evidence that the usage had been the same almost time out of mind; that the land in question was *littus maris*, not indeed so dry as *terra firma*, but still shore of the sea, and not covered at low water, with the exception of a small lake or inlet: the place, therefore, falls within the description of land, about which there can be no doubt as to the law, that an individual may claim a right in it, either by grant or by usage independently of grant. Most of the evidences, which Hale, *De Jure Maris*, pars 1, c. 6, p. 27, enumerates as denoting such a right exist here "constant and usual fetching gravel and sea-weed and sea-sand, between the high water and low water mark, and licensing others so to do; enclosing and embanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand." The grants of Charles the Second call the spot in question ooze land, and, therefore, are evidence to show that, even in those days, the place was considered as between high and low water mark; and, as nothing was done under them, they rather make against the defendant than for him, as it should thereby seem that, when the grantees came to act under their grant, they found an obstacle in an earlier and better title.

*CHARLES CHRISTIE, GEORGE ALEXANDER WYLIE, and [*410
 WILLIAM ATKINSON, Assignees of the Estate and Effects of
 GEORGE LAING, a Bankrupt v. LEWIS LEWIS.

By charter-party between defendant, owner of a ship, and G. L. Defendant granted and to freight let, and G. L. took and to freight hired the ship for the voyage. Defendant covenanted that the master should receive on board at London, goods to be sent alongside by G. L., and deliver them from alongside at Newfoundland, according to bills of lading, there receive, and deliver at Demerara other goods, in like manner; and there, in like manner, receive other goods, and deliver them in the London docks, according to bills of lading; and that the ship's boats should assist in loading and unloading, so as the exclusive duties and operations of the ship should not be thereby impeded. In consideration whereof G. L. covenanted to send and take from alongside goods, and to pay for the freight and hire of the ship for the voyage 2600L., with primeage, &c., one-quarter part thereof on delivery of goods at Newfoundland, by good bills at 60 days' sight on London, and the remainder by good bills at two months' date from the day of the ship's report inwards at the port of London. The voyage was performed, and goods of third persons brought from Demerara under bills of lading, deliverable to the consignees on payment of certain specified freights therein mentioned, which freights the defendant received, no bill for the three-quarters freight per charter-party having been given or tendered to him, and a bill for one-quarter given at Newfoundland having been dishonoured: Held, (Dallas, C. J., dissentient,) first, that, notwithstanding the words of grant, taking the whole charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner; and that, as the freight per charter-party was to be paid to him by good bills, prior to the delivery of the homeward cargo, he had a lien thereon for such freight: secondly, that he had a right to receive the freight per bills of lading from the consignees, and had a like lien on such freight when so received.

ASSUMPSIT for money had and received by the defendant for the use of George Laing, before he became a bankrupt, and also for money had and received by the defendant, to the use of the plaintiffs as assignees of the estate and effects of the said George Laing, after his bankruptcy. The declaration contained the other usual money counts, with an account stated. The defendant pleaded the general issue. At the trial of the cause before GIBBS, C. J. (London sittings after Trinity term, 1817,) a verdict was found for the plaintiffs, with 1981L. 16s. 9d. damages, subject to a "reference as to the amount, [*411 and to the opinion of the court upon a case which was, in substance, as follows :

The defendant on the 2d February, 1815, and from thence continually until the 1st April, 1816, was sole owner of the ship Ann belonging to the port of London. On the 2d February, 1815, the defendant as such owner, and George Laing the bankrupt, entered into a charter-party, under seal, by which the defendant for himself, his heirs, executors, and administrators, granted and to freight let, and George Laing for himself, his executors, administrators and assigns, hired and to freight took the ship Ann, for the voyage, upon the terms and conditions, and for the considerations following : *In primis*, the defendant covenanted, that the vessel being tight, staunch, and substantial, well manned, tackled, appareled, and furnished as is usual for vessels in the merchants' service, and for the voyage thereafter mentioned, the master William Wilson, or some other proper person, should receive and properly stow on board the said vessel, all such lawful goods, wares, and merchandises, as the said freighter or his assigns might think proper to send alongside her in the port of London, not exceeding, in the whole, what she could safely stow and carry, over and above her stores, tackle, apparel, and provisions; and, having received the same on board, and being despatched, the master should immediately (wind and weather permitting) set sail, and proceed in and with the vessel from the port of London, and proceed to Portsmouth, there to join and sail with the first convoy appointed for Newfoundland, and, being arrived at St. John's in Newfoundland, should make a right and true delivery of the cargo from alongside, to the agents or assigns of the said freighter, according to the bills of lading signed in London; such cargo being discharged, and the vessel *rendered tight, staunch, and substantial, well manned, and furnished in the manner aforesaid, the [*412

master should receive, and properly stow on board, from the agents or assigns of the said freighter, all such lawful goods as he or they might send alongside, in craft (provided at the costs and expenses of the said freighter, his heirs or assigns) not exceeding, in the whole, what she could safely stow and carry, over and above her stores, tackle, apparel, and provisions ; and having so completed her loading in St. John's, and being despatched, should immediately (wind and weather permitting) set sail, and proceed from thence, with or without convoy, to Demerara ; and having arrived there, should make a right and true delivery of the cargo from alongside to the agents or assigns of the said freighter, the conveyance to the shore to be at his or their expense ; and having discharged the same, according to the bills of lading signed at Newfoundland, and the vessel being in readiness, after the manner aforesaid, for the further continuation of the voyage, the master should take, receive, and properly stow on board the said vessel, all such legal goods as the agents or assigns of the said freighter should send alongside of her, not exceeding as aforesaid ; the conveyance of such goods from the shore to the ship to be at the expense of him the *said freighter*, his agents or assigns ; and being so loaded and despatched, should immediately (wind and weather permitting) set sail, and proceed from Demerara for the port of *London*, and, on arrival at the West India dock there, make a right and true delivery of such her homeward cargo, agreeable to bills of lading, and then end the intended voyage (the act of God, the king's enemies, fire, the dangers and accidents of the seas, rivers, and navigation, of whatsoever nature and kind, always and in all cases excepted.) And the owner agreed, that due assistance should be given with the ship's boats, *properly manned for the purpose, in unloading and loading the cargoes, at the respective ports above mentioned, at all times, when required by the freighter, his agents or assigns ; but it was understood, that no impediment was thereby to be made, in carrying on the exclusive operations or duties of the ship ; and the owner further covenanted with the said freighter, that he should be allowed, in the whole, 100 running days for loading the vessel in the river Thames, for unloading and loading her in St. John's, and for unloading and loading her in Demerara ; provided that the vessel should not be delayed at St. John's, Newfoundland, for the purpose of loading and unloading, more than 25 running days in the whole ; but it was fully agreed on by the said parties, that the vessel should be loaded at Demerara, and despatched in time for her to sail, and depart from thence for the port of London, on or before the 1st day of August, then next ensuing. In consideration whereof, George Laing, for himself, his heirs, executors, and administrators, covenanted with the defendant, his executors, administrators, and assigns, that he the said freighter, his agents or assigns, should send, or cause the several cargoes above referred to, to be sent alongside the vessel, and also take from alongside the vessel, at the respective ports of loading and unloading above mentioned, free of expense, in providing craft or other conveyance for that purpose, to the owner of the vessel as aforesaid, the boats of the ship properly manned, assisting in such unloading and loading of said cargoes, at all times when required, but not to the impediment of carrying on the exclusive operations or duties of the ship, conditioned and agreed to on the part of the owner, as above, and that within the time before limited, or days of demurrage thereafter mentioned. And further, that the said freighter, his executors, administrators, or assigns, *should well and truly pay or cause to be paid unto the said owner, his heirs, executors, administrators, or assigns, in full, *for freight and hire* of the vessel for such voyage, the sum of *2600l.*, together with *5*l.* per cent.* prime thereon, and, in addition to the freight and prime, two-thirds of all dock dues, port and pilotage charges incurred during the whole of the voyage ; the said freight, &c. was to be paid as follows (*viz.*) one-quarter part thereof on a right and true delivery of the cargo at Newfoundland, by a good bill or bills on *London*, at *60 days' sight*, and the remain-

der thereof by a good bill or bills, at two months' date from the day of the ship's report inward in the port of London; and the freighter, for himself, his executors and administrators, covenanted with the owner, his executors, administrators, and assigns, to make all necessary disbursements and advances, both at Newfoundland and at Demerara, in and about the concerns of the ship, all which advances were to be deducted from the last payment of the freight, provided that it should be lawful for the said freighter, his agents or assigns, to detain the ship, on demurrage, at the ports of loading or unloading aforesaid, any or either of them, any time or term not exceeding 20 days, on paying the owner of the vessel, or his order, ten pounds demurrage money per day, day by day, as the same should become due. And for the true performance of all and singular the covenants, clauses, provisoies, and agreements therein contained, the parties respectively thereby bound and obliged himself and themselves, his and their several and respective heirs, executors, and administrators: the defendant especially bound his vessel, her freight and appurtenances, and the said George Laing, the cargoes to be laden on board of her, unto the others and other of them, and to the executors and administrators of the others and other of them mutually and reciprocally, in the penal sum of 5000*l.*

*After the execution of the charter-party, a cargo of goods was shipped by George Laing, and divers other merchants, in pursuance of arrangements made between them and George Laing, on board the vessel in the river Thames; and William Wilson, the master, at the request of George Laing, signed bills of lading, for the goods deliverable to the several consignees thereof, at the port of St. John's, in the island of Newfoundland, according to the form of the bill of lading next hereinafter set forth; the freight of such of the goods as were not shipped by George Laing, was paid by the shippers to George Laing, in London, at the time the bills of lading were signed. The goods shipped by George Laing were consigned by him to Hart and Robinson, of Newfoundland, for sale, on his account.—“Shipped, &c., in good order and well conditioned, by George and James Brown, in and upon the good ship called Ann, whereof is master, &c., for this present voyage, William Wilson, and now riding at anchor in the river Thames, and bound to St. John's, Newfoundland, to say, 10 barrels pitch, &c. &c. being marked and numbered as in the margin, and are to be delivered in the like good order, and well conditioned, at the aforesaid port of St. John's, Newfoundland, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, navigation of whatever nature and kind soever excepted, unto Messrs. Hutton, M'Lea and Co., or to their assigns, freight for the said goods being paid in London, with primeage and average accustomed. In witness whereof, the said master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which three bills being accomplished, the other two to stand void. And so, &c. Dated in London, 7th March, 1815, quality and contents unknown to William Wilson.”

*The Ann sailed from the river Thames on the 16th March, 1815, on the voyage mentioned in the charter-party, arrived at St. John's on the 12th May, 1815, and delivered her cargo, pursuant to the said bills of lading, signed by the master. James Laing, a brother of the bankrupt, sailed in the vessel to St. John's, as supercargo of George Laing, and acted as such for the voyage. After the delivery of the cargo at St. John's, the master applied to James Laing, for a bill or bills of exchange for 650*l.*, as for one-quarter of the freight, agreeably to the stipulations contained in the charter-party; and James Laing accordingly drew two bills of exchange for 350*l.* and 300*l.*, upon George Laing, payable 60 days after sight, to the order of the defendant, and delivered them to the master. These bills were remitted by the master to the defendant, and were duly accepted by George Laing. They fell due on the 26th August, 1815, were dishonoured by the bankrupt, and have not since been paid. After

the discharge of the cargo, Messrs. Hart and Robinson, of St. John's, by the order and on the account of George Laing, purchased and shipped a cargo of codfish on board the Ann, for Demerara, and the master signed a bill of lading for the delivery of the cargo of fish to James Laing, at Demerara. The vessel, on the 6th June, 1815, proceeded from St. John's, with James Laing on board, on her voyage to Demerara, where she arrived on the 3d August, 1815. After the vessel had discharged her cargo at Demerara, James Laing engaged Messrs. M'Garrel and Co., at that place, to procure a homeward freight, and various goods were, through their assistance, shipped on board the Ann, at Demerara, by different merchants, for which goods the master of the ship signed bills of lading, in the following form.

"Shipped in good order and condition, by John M'Garrel, in and upon the good ship called the Ann, whereof William

*417] "Wilson is master, for the present voyage, now lying in Demerara river, and bound for London, 20 hhds. sugar, being marked and numbered as in the margin, and are to be delivered in the like good order and condition, at the aforesaid port of London, (all and every the dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted) unto Messrs. Underwood, Hall, and Co., or to their assigns, he or they paying freight for the said goods nine shillings sterling *per cent.* In witness whereof, the said master or purser of the said ship hath subscribed to four bills of lading, all of this tenor and date, one of which being accomplished, the rest to stand void. Dated in Demerara, 9th November, 1815. William Wilson. Quality and contents unknown." On the 3d December, 1815, the vessel set sail from Demerara on her homeward voyage; and having arrived in the port of London, was reported in the custom-house on the 26th of February, 1816, and on the same day entered the West India docks for the purpose of discharging her cargo. James Laing remained at Demerara, and afterwards came home by the packet. On the 23d February, 1816, a commission of bankrupt was issued against George Laing, under which he was found and declared a bankrupt, upon acts of bankruptcy committed by him on the 12th, 13th, and 14th of February, 1816. The plaintiffs were duly chosen assignees of his estate and effects, and an assignment thereof was made to them by the major part of the commissioners named in the commission, by indenture dated the 19th March, 1816. On the day of the report of the Ann at the custom-house in London, a copy of the manifest of the cargo of the Ann brought from Demerara, with a notice to the directors of the West India docks not to deliver any of the goods without the

*418] order of Messrs. Harrison *and Betts, was delivered to the directors of the West India dock company by the master, by the direction of the defendant or his agents. No sum or sums of money, nor any bill or bills of exchange, were ever demanded by the defendant, or tendered or offered by the bankrupt, or by the plaintiffs, or by any other person to the defendant, for the sum of 2600*l.*, in the charter-party mentioned; or of any part thereof, either upon the report of the Ann inwards, or at any time before or since.

William Wilson and the crew of the Ann were, upon the voyage mentioned in the charter-party, and agreeably to the terms thereof, hired and employed to navigate the vessel; and the vessel was during the voyage navigated, with the exception of the port and pilotage charges and dock dues, mentioned in the charter-party, at the defendant's expense. The goods brought by the Ann from Demerara were delivered out of the Ann into the West India docks, on the 14th March, 1816. The defendant employed Messrs. Harrison and Betts, ship brokers, of the city of London, to report the ship, and collect the freight of the goods brought from Demerara by the Ann from the respective consignees thereof, for his use and on his account; and, under such employment, Messrs. Harrison and Betts received from the consignees of the goods the freight payable by them respectively, and afterwards paid over to the defendant the balance of the money so received, after deducting the dock and other charges.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover the money so received for freight, and so paid over to the defendant by Messrs. Harrison and Betts, as above mentioned? If they were, the verdict was to stand; if not, the verdict was to be set aside and a nonsuit *entered, unless the court should think fit, upon the application either [419 of the plaintiffs or of the defendant, to turn this case into a special verdict.

This case was thrice argued. First, in Trinity term, 1819, by *Bosanquet*, Serjt., for the plaintiff, and *Copley*, Serjt., for the defendant. Secondly, in Michaelmas term, 1819, by *Vaughan*, Serjt., for the plaintiff, and *Lens*, Serjt., for the defendant. And now by *Taddy*, Serjt., for the plaintiff, and *Hullock*, Serjt., for the defendant.

Arguments for the plaintiffs.

First, the defendant is not entitled to retain the money he has received for the carriage of goods (a) by the ship Ann, because he was not entitled to demand it. There was no contract express or implied, no privity, between him and the parties who were to pay for the carriage of the goods; those parties contracted with Laing, and Laing alone could have sued them for the carriage. The defendant was, under the charter-party, to be paid by Laing the hire of his vessel, not by the shippers or consignees for the carriage of goods. The question between carriers and the owners of goods carried, is not, whose is the wagon, or whose is the ship, but who is the carrier? Here Laing was the carrier, and at Demerara absolutely put up the ship for goods, as a general ship; it would be a great hardship, if the shippers at Demerara, who contracted with Laing for the carriage of their goods, and had no means of knowing his engagements to the defendant, should be liable, not only to Laing for the carriage of their goods, but also to the defendant for his claims on Laing, and this distinguishes *the case from *Tate v. Meek*, 2 B. Moore, 278; S. C. 8 Taunt. [420 where, by the very terms of the bill of lading, the shippers were referred to the charter-party, and the carriage of the goods was to be paid according to the terms of that instrument. But, as a general rule, it is clear that where there is a charter-party, the carriage for goods is to be paid to the charterer, and not to the owner, *Moorsom v. Kymer*, 2 M. & S. 303; and where, as in the present case, the owner of a ship has a claim against the charterer, for the hire of the ship, the shippers or consignees of goods are not liable to pay that hire. *Paul v. Birch*, 2 Atk. 621. The defendant, having induced the consignees to pay him in discharge of what was due to him from Laing, the bankrupt, has in effect defeated the bankrupt laws by obtaining a preference over the other creditors, and that too, without a foreign attachment.

Secondly, the defendant had no lien on the goods conveyed in the Ann. First, because he could not have sued the owners of the goods, either for the hire of the ship due from Laing, or for the carriage of the goods, and if he could not sue them, he could not detain their goods. Secondly, because the defendant could not have detained the whole of the goods, till the whole of his demand against Laing was satisfied. He could not pretend, on any principle, to detain those for which the carriage had been paid, because the carriage due for the rest was unpaid, or because the whole of his demand against Laing was not satisfied; (*Phillips v. Rodie*, 15 East, 547, and *Birley v. Gladstone*, 3 M. & S. 205, show that the owner of a ship cannot detain goods as against the charterer for dead freight:) and yet a right of lien cannot exist, where the party claiming it, has not a right to detain all the goods *in respect of which [421 the lien attaches, till the whole of his demand is satisfied. Thirdly, and mainly, the defendant had no lien, because he had no possession of the ship,

(a) To avoid the confusion occasioned by the double meaning of the word "freight," (viz. hire of ship, and carriage of goods,) the reporters have in the arguments used those expressions instead of *freight*.

and consequently no possession of the goods. By the express terms of the charter-party, the ship is let to freight and taken to freight: But, he who takes a ship to freight is in all respects owner during the continuance of the charter-party, *Trinity House v. Clark*, 4 M. & S. 288. So much so, that he cannot commit an act of barratry, *Vallejo v. Wheeler*, Cowp. 143; S. C. Loft. 631; *Soares v. Thornton*, 7 Taunt. 827; S. C. 1 B. Moore, 373. *Parish v. Crawford*, Abbott on Shipping, 21, 3d ed; S. C. 2 Str. 1251, which held a doctrine different from that in *Trinity House v. Clark*, has been overruled by *James v. Jones*, Abbott on Shipping, 3d ed. 23; S. C. 3 Esp. N. P. C. 27, and *Frazer v. Marsh*, 13 East, 238. In *Saville v. Campion*, 2 B. & A. 503, the charter-party contained no actual demise, but merely covenants of various kinds. Here, there is a complete demise expressed in apt terms, and transferring the possession of the ship, for a given time, from the owner to the charterer and his assigns. The word assigns is alone sufficient to show the completeness of the transfer. The charterer, too, had a supercargo on board, and took upon himself to put up the ship as a general ship at Demerara. In *Tate v. Meek*, there were no words of demise: which was also the case in *Yates v. Mennell*, 2 B. Moore, 297; S. C. 8 Taunt. In *Yates v. Railston*, Id. 294; S. C. 8 Taunt, the decision turned on the ground that the delivery of the goods and the payment of the freight were concurrent acts. *Hutton v. Bragg*, 7 Taunt. 14; S. C. 2 Marsh. 339, where the charter-party contained the words (though they do *422] not appear in the report,) *let the vessel to freight to the merchant, who hath, accordingly, hired and taken the same*, is in point for the plaintiff, and is sound law according to the foregoing principles; if, however, it should be impugned, it is distinguishable from the present case, on the ground that this is an action to recover money improperly received; that was trover for the actual detainer of goods; and if the defendant in the present case could have detained the goods, yet, he had no right to receive the money claimed, at the time and in the manner in which he received it. For,

Thirdly, even if the defendant ever had any lien, there was a complete waiver of it on his part, first, by his entering into an agreement inconsistent with the right of lien: secondly, by his delivery of the goods before the money claimed was paid. Though every special agreement will not destroy the party's lien, yet an agreement inconsistent with lien must have that effect, *Crawshay v. Homfray*, 4 B. & A. 50. Here, the defendant had agreed to give credit; to be paid, as to three-quarters of the amount of the hire of the ship, by a bill at two months after the report of the ship inwards; how then could he detain the cargo on the ship's return, when his claim would not be complete till two months afterwards? At all events, lien, by the very nature of it, ceases on the delivery of the goods on which the lien arises; so that, even if the defendant was entitled to a lien, he had no right to receive the money now claimed, for the reasons stated in the first part of the argument.

Arguments for the defendant,

The real question is, whether, on the construction of this charter-party, the absolute possession of the vessel passed to Laing? The instrument undoubtedly *423] contains "in the beginning, the most comprehensive and apt words of demise; but they are not of themselves conclusive, and the construction must be sought from the context and intention of the whole: for, as words which are not apt words of demise will constitute a demise, if upon the whole a demise appears to have been intended by the parties; so apt words of demise will not of themselves constitute a letting, if, on the whole, a contrary intention appears, Bac. Abr. *Leases*, K.; *Doe v. Ashburner*, 5 T. R. 163; *Poole v. Bentley*, 12 East, 168; *Tempest v. Rawling*, 13 East, 18. Undoubtedly, there may be cases in which the absolute possession of a ship may pass to the lessee, as if it should be let for a term of years, and the lessee should appoint and pay the master and crew, and provide for the repairs; but such is not the case with

ordinary charter-parties, nor is such the mercantile construction put on those instruments. A man does not hire a ship as he hires a house, for the purpose of having absolute and exclusive possession, but merely the use of the hull, for the conveyance of his goods. Notwithstanding the words *let to freight* and *taken to freight*, all the provisions of the present charter-party are inconsistent with absolute possession in the charterer, or with abandonment of possession by the owner. The owner appoints and pays the captain and crew, the repairs, and most of the expenses incidental to the ship; the captain receives and stows the goods sent by the charterer; the captain is to assist with his boats, but such assistance is not to interfere with the duties and operations of the ship, which shows that the assistance is not given by him in the character of servant to the charterer. If the ship had run down another vessel, the *master and owner would have been liable to be sued, and not the charterer. [*424] The decision in *Hutton v. Bragg* has often been impugned, and in that case, the attention of the court was not particularly called to the nature of the owner's interest, after he has entered into a charter-party. But in *Saville v. Campion*, the court expressly relied on provisions similar to those contained in the present charter-party, to show that the absolute possession did not pass to the charterer. The decision in *Trinity House v. Clarke*, turned entirely on the nature of the service in which the vessel was engaged, which being the public service, it was essential to the success of the undertaking, that the charterers should be taken to have the full and undisputed possession. *Soares v. Thornton*, and *Vallejo v. Wheeler*, only decide that the freighter (whether under a charter-party or not) is owner, *pro hac vice*, as far as respects an act of barratry; but that does not touch the present question; for the freighter may, by agreement, have such a power as to despatch the vessel in any direction he pleases, though the possession of her may remain in the owner, and the owner be himself on board. In *Paul v. Birch*, the decision was, that the owner of the vessel could not detain the goods against the consignees, to discharge the hire of the ship due from the charterer. The defendant, in the present case, did not detain the goods from the consignees, or for the hire due to him by Laing; but, being in possession of the ship, he received sums due for the carriage of the goods conveyed at his expense, and in his vessel. If he were afterwards to sue Laing for the whole amount of the hire on the charter-party, the sums so received, would go in part discharge of that hire; but provided he do not recover twice, there can be no reason why the defendant should not have more than one remedy for the compensation due, for the use of his vessel. In *Phillips v. Rodie*, and *Birley v. Gladstone*, the goods were detained against the consignees for dead freight due from the charterer; a claim which is not contended for in [*425] the present case. It may be admitted, that a party abandons his lien, by agreeing to give credit, (and that was the case in *Crawshay v. Homfray*,) but it is immaterial whether a payment be by money or bills. In *Tate v. Meek*; *Yates v. Railston*; *Seville v. Campion*, and *Hornastle v. Furran*, 3 B. & A. 497, the payments were all by bills. In the last case indeed, the bills were given and negotiated, and on that account the lien was held to be waived; but here the bills were not given on the return of the ship, nor any payment made.

DALLAS, C. J. This case has been so often and so fully before the court that it is not necessary for me to restate the facts. The general question depends on these general grounds. The defendant, the owner of the ship, contends that he had a lien on the goods on board, for the freight due, or on the money received for such freight. To have a lien, he must have had at the time of the asserted exercise of it, the possession of the ship. He had the possession when he executed the charter-party,—and the question is, whether, by — charter-party, he has parted with the possession for the particular voyage! And I will say, in the outset, this is not like the common case of a carrier, who has,

in point of law, known rights and known liabilities. These depend on the law, as it applies to the case of carriers; but the carrier may vary his general liability by special agreement; so may the ship-owner, even if he could be treated as a common carrier; and the charter-party constituting the specific agreement between the parties, it is upon the effect of it that the question arises. This case appears, therefore, to me, in the general view of it, to depend on *Hutton v. Bragg*; and if *Hutton v. Bragg** be law, it must govern now. In *Hutton v. Bragg*,^{426]} on the best consideration I could give the case at the time, I concurred in opinion with the late chief justice and my brother PARK. My brother BURROUGH was absent, and we had not then the benefit of my brother RICHARDSON's assistance on the bench. The having concurred in the former judgment would be no reason for my not delivering a different opinion now, if I really entertained it. I never could agree with an expression I have met with, namely, "I must so decide to be consistent with myself," though the words came from a person of all others the most entitled, if at all, to make use of them. No man is bound to be, or has a right to be, consistent in error; but, before he consents to overturn a judgment in which he concurred, he ought most clearly to see that he was formerly wrong. If such were my case, I should, therefore, only lament having been wrong before, but certainly should not persist in being wrong now. It is equally incumbent on those, (and for reasons which I fully admit, and of which I as fully approve) to deliver a different judgment now, who see the point now, in a different light. On this part of the subject, I will only further say, if it required to be adverted to, that scarcely a question can occur in which I can have less reason personally for maintaining a former opinion. The judgment delivered, was delivered chiefly by the late lord chief justice, and what weight his opinions had, because they were entitled to have, with his brothers on the bench, it is not necessary for me to state. From a judgment maturely formed by him and assented to by me, it would not be blamable, I think, if I felt a little reluctance, even upon this ground alone, to abandon it, when he can no longer reconsider the opinion which he then delivered, and support or renounce it, as by the argument which we have now heard and those which have preceded it, he might have been led to do. Still, however, I agree, it results to the *consideration of what is the opinion we may respectively now entertain,^{427]} and the degree of assurance with which that opinion is formed; and what I have said, I have said only for reasons which, in the sequel, will appear.

And first, I shall begin by stating, that *Hutton v. Bragg*, being directly in point, I know of no case, as I understand the cases, before nor since, (nor has any such been cited,) repugnant to it; none repugnant in decision; none, of necessity, inconsistent in point of principle; none, in point of analogy, the other way. I have read in loose and confident assertion, that the decision excited surprise at the time; and I have no hesitation in saying, that the case did not, I believe, meet with universal concurrence, and this may be taken even more strongly if necessary. It is enough for me to know the doctrine in question has received the sanction of this court, which never has been expressly dissented from by any other; that this is now the third time it is argued here, and that it was intended to have been argued before all the judges, if the convenience of the other courts would have permitted; and I lament that it did not. Do I, under these circumstances, entertain a degree of conviction sufficiently strong that the former judgment was erroneous, is the question which, with reference to myself, I have been bound to consider; doubts entertained are not sufficient to overturn a decision pronounced. Much has been said of convenience or inconvenience one way or the other; on this I put no stress, for this is a case which is not to lay down any rule of general operation for the future, but to turn upon the language of an instrument which may be differently

framed in all future cases, and may have been, and, if common prudence has guided the conduct of the parties, must have been in all cases since *Hutton v. Bragg* was decided.

It is admitted, and indeed it is self-evident, that a ship may be let to hire, so as to constitute the party *hiring the owner for the time, provided that such appears upon the instrument to be the intent of the parties; [^{*428}] and this may be done by apt words of hiring and letting, or by necessary construction. But, it is said, that the mere words of hiring and letting will not, of themselves, invest a party with the possession of the ship, if all the provisions of the instrument qualify and restrain the words, and show that the hiring and letting were not used in their ordinary sense and signification; in other words, that the construction must be on the whole instrument; and to this I agree, subject to this qualification, viz. that if the separate provisions of the instrument would be manifestly repugnant to giving such a construction to the general words, they ought not to receive it; but, if there be no direct repugnance, then the general words being emphatic and essential words, and words applied to other subjects of known legal operation, cannot be rejected, but must operate according to their common, and, still more, their received legal import. And to this the question comes, for I must here again observe (there being nothing incongruous in the nature of the thing, that a ship should be let to hire so as to make the hirer the owner for the time, and whether so let or depending on the nature of the agreement) it resolves itself into a mere question of construction in the particular case.

What then are the general words in this case, and what the special provisions? The words are, on the part of the ship-owner, "granted and to freight let," and of the charterer, "hired and to freight taken," than which, of themselves, I know no words more apt to let pass the possession of a ship as well as of a house, though I agree the subjects are different; they are words of grant and demise, and pass possession in the particular case. Such is the opinion of Lord ELLENBOROUGH in the case of *The Master of the Trinity House v. Clark*; *his lordship's words are "The charter-party 'grants' [^{*429}] the ship 'and lets it to hire and freight,' (the very words of this case) which are proper words of lease, and would, of themselves, pass the possession. The purpose is mentioned, but the mention of the purpose does not restrain the possession, though it may restrain or qualify the use of the thing let to hire." I refer to this case, not as in point as to the decision, but for the construction of words similar in both charter-parties, and so far, at least, Lord ELLENBOROUGH's opinion is in point, and as to the other grounds of decision in the case so referred to, I shall presently advert to them. In *Saville v. Campion*, Lord Chief Justice ABBOTT says, "The terms of the charter-party in the case of *Vallejo v. Wheeler* are not very clearly shown in the report of the case, but it has always been considered that the ship was thereby let to freight. In the case of *The Trinity House v. Clark* the deed was in that form, and in the judgment in that case great reliance was placed on the objects and purpose as well as on the terms of the deed. The charter-party in the case of *Hutton v. Bragg* was also in terms of letting to hire."—"In the case now before the court the charter-party contains no such terms." And here, again, I would observe, I cite this case only for the materiality attached as in the former case to these words, and not for the whole case, as in point to the present; for in fairness I should say, as far as I know the opinion of the judges in that court, they are not, probably, favourable, on the whole, to *Hutton v. Bragg*. But it is said, that "letting to freight," are words to be understood in opposition to the letting of the ship, and are to be deemed a mere specification of the mode in which the ship was to be employed; to this I have already given the answer, namely, that the words were precisely the same in the case of *The Corporation*

of the Trinity House v. Clark, where no such distinction was taken, still less adopted; *and in which the construction was expressly put as in the subsequent case, that such words by themselves would pass the possession of the ship; but it is to be observed the words are not only, "to freight let," the words are "for freight and hire" of the said vessel for such voyage.

If, then, these words would, of themselves, pass the possession of the ship, what is there in the other provisions of the instrument repugnant to it, and to turn the words round to a meaning different from what they would otherwise bear? In the first place, it is in terms a letting and taking of the *ship*, that is, the whole ship; next, it is not a taking of so much tonnage, or according to a settled rate of tonnage, but a gross sum for the whole voyage. It was competent to the charterer, therefore, to make any contract with others for the freight of their goods, and to put her up as a general ship from the moment of the execution of the charter-party for the voyage contracted for. Their contract would, therefore, be with the freighter, and not with the general owner; and so was it in this case—goods were sent on board on a contract, not with the actual owner, but with the freighter or temporary owner. So far there is nothing in the particular provisions repugnant to a general letting and hiring, but coincident and consentaneous with it; it being sufficient, however, that there is nothing discordant or repugnant. But, it is said, the master and the crew were appointed by the owner; that the management of the ship remained with the master; that this constituted a continuing possession; and that the charter-party is but, in effect, a covenant to convey, modified by a detail of stipulations for managing the ship, so as not to disturb the actual ownership: and this ground has been mainly relied on.

That it has weight, I do not mean to deny; but, that it overrules the words of grant and letting, is that *which I cannot admit. A ship may be let with a stipulation that she shall continue to be navigated in all respects as before, and the services of the master and crew may be let together with the ship. And for this I shall only again refer to the case of *The Trinity Corporation v. Clark*. "It is urged," said Lord ELLENBOROUGH, "that the use and service of the ship only are parted with, and that the possession and ownership are retained by the conduct and navigation being left to the mate and crew, who are the servants of the owners of the ship, chosen and fed and paid by them." Now how is it that his lordship meets this? "The whole argument," he says, "rests on a fallacy: the possession, such as it is, of the master and crew is not retained by the proprietors of the ship to interfere with the full and free use of the ship, but as subsidiary and subservient to it.—the vessel, therefore, is not only hired, but along with it, the services also of a certain number of persons paid by the proprietors, and necessary to the use of the vessel. It is the same thing as the hire of a wagon and team for a certain term, the proprietor of the wagon stipulating that the wagon should be driven and the horses taken care of by his own wagoner and boy;" and after dilating a little more upon this instance, he quits the subject, by saying, "This is indeed *idem per idem*, but, as the instance is more familiar, it serves to put the point in a clearer light." In another part of the report, Lord ELLENBOROUGH is made to say, "As a general proposition, it is hardly denied, on the present occasion, that the charterer of the ship is the owner *pro hac vice*, but the precise point made here is, that the appointment and employment of the crew are left to the owner, as to which we have already given our opinion," which opinion was that which I have read, viz. that this does not make it less a letting of the ship. In the present case, therefore, as in *The Corporation of the Trinity *House v. Clark*, the master and crew, continuing in the employment of the actual owner, form no argument against the ship being let; but the letting of the ship, with a stipulation for their continuance, is not less a letting on account of such stipulation. So that here again it comes round to the general question,—what is

there in this charter-party to restrain the operation of the general words, by which I mean the words of granting and letting the ship to freight on one side, and of hiring and taking on the other?—certainly not these provisions, according to Lord ELLENBOROUGH's opinion. In referring to these two cases, I have already disclaimed citing them as authorities, as to the grounds of decision for the present case. In *The Corporation of the Trinity House v. Clark*, the decision was formed on two points; first, the words of grant and demise, and, secondly, the nature of the service:—and it may be fairly said, if the words of letting alone were sufficient why call in aid the nature of the service? But it may as fairly be answered, why not rely entirely on the nature of the service, without calling in aid also the words of hiring and letting; and further, why appear to enforce them as emphatic and essential words, and make them, though in part, the ground of decision? The fair result of the case in its application to the present, I, therefore, conceive to be, that the words, which were in that case, and are in this, are sufficient to constitute the freighter the owner for the particular voyage, unless inconsistent with the general effect of the grant; and what was chiefly relied upon in this case, was relied upon in that, and not held to restrain the general words; and though I admit the nature of the employment to be different, still, such difference, in my view of the two cases, raises no repugnance; and, therefore, the general words are left to their full operation and effect.

*As to the case in Barnewall and Alderson, I will only remark, that it professes not to overturn *Hutton v. Bragg*, but expressly distinguishes it from the case then under consideration, as not having the words of hiring and letting, and though not going the length of saying these words would have made the difference, still the words are referred to as sufficient to constitute a distinction; and, at any rate, it leaves *Hutton v. Bragg* on its own ground. In fairness, however, I ought to add, that the distinction was, I apprehend, chiefly pointed out, as rendering it not necessary to interfere with *Hutton v. Bragg* one way or the other. Again, therefore, I have referred, to both cases, not for the grounds of decision, but for the doctrines they contain.

I forbear to rely on *Vallejo v. Wheeler*, being willing to admit that what is said by Lord ELLENBOROUGH may make a distinction, namely, that it must be confined to the subject agitated in it, that is, against whom *barratry* may be committed; and further, having no reason to doubt what is said by Lord Chief Justice ABBOTT, in *Saville v. Campion*, "The terms of the charter-party are not very clearly shown in *Vallejo v. Wheeler*, but it has always been considered that the ship was thereby let to freight."

These are my grounds for not consenting to overturn the decision of this court in *Hutton v. Bragg*; not that I entertain, nor would it become me to entertain, any very confident opinion, or an opinion not mixed up with some doubt. But, to overturn what has been solemnly decided, I have already said, I must have a confident conviction that such decision was erroneous. This I do not sufficiently entertain, and I am the less anxious as to the result, because, as I shall probably be single in the opinion I now give, no harm can result to the parties in the particular case: and with respect to any general rule, the result of the case is quite immaterial; for, decided one way or the other, parties may, *in future, frame their charter-parties accordingly. I am therefore, [434] of opinion, that judgment should be for the plaintiffs.

PARK, J. I am sorry to differ from the very able, luminous, and candid opinion which has just been delivered; and it is to be lamented that so many cases have arisen upon charter-parties, owing very much to the obscure language in which those instruments are frequently framed, and to their being prepared by persons totally ignorant of the rules of law.

The question, however, in all these cases, generally has been a question of construction, or rather a question of fact arising out of the construction, whether

there has been an entire letting or parting with the possession of the ship for given purposes, so that, during that time, the owner has no efficient control, but the charterer has the full disposition of the ship: or, in other words, to use the language of Lord Chief Justice GIBBS in *Tate v. Meek*, whether the delivery of the cargo and the payment of freight are to be considered as concomitant acts. When the fact is ascertained, the legal result is clear. Now, when this distinction of fact is attended to, the cases may all be explained, I won't say reconciled; because various judges, at different times, have given a different construction. If all had agreed, the same result would have followed; because, in looking through all the cases, I uniformly find that all agree that it is only upon the entire and absolute parting with the possession and control of the ship, that the charterer is to be considered as owner *pro hac vice*. Thus, in *Vallejo v. Wheeler*, the charterer (whether rightly or not) was to be treated as owner; and then all agree, as was considered by Lord Chief Justice ABBOTT in *Saville v. Campion*, that all the duties, rights, and privileges of owner attached upon him [in a "question of barratry; and there is a great difference between cases of barratry, especially where (as in that case, as well as in that of *Soares v. Thornton*, afterwards in this court) the great question was, whether the charterer was so far owner as to prevent him from being defrauded of the benefit of his insurance by the barratrous conduct of the original owner. So, in the case of *The Trinity House v. Clark*, the court considered the crown as actual temporary owner, from the nature of the charter-party, which was not for any specific voyage, but for various duties and stations, all to be regulated as the exigency of the public service might require, granting the ship and letting it to hire and freight, which, says Lord ELLENBOROUGH, are proper words of lease, and would pass the possession. "From all which expressions in the instrument (said his lordship,) and from the nature of the service stipulated for, which is of the utmost importance, and might be delayed, and even frustrated, if the crown was not authorized to take possession of the ship to secure its immediate execution, but was left to a bare action of covenant against the proprietors of the ship, if they were to refuse to permit their ship to sail, it is contended that the crown had an executed right of possession in, and was legally and actually possessed of, the ship, and owner thereof, within the meaning of these charters, during the period in which the services were performed, which gave rise to these claims."—"It is evident that the service contracted for is of the highest importance to the country, and that its most valuable interests may depend upon the immediate execution of such service, as this charter-party authorizes the crown to require, and the proprietors of the ship agree to perform. Whatever construction of the contract enables the crown to enforce a prompt obedience to its terms, must be most agreeable to its spirit and intent. If the proprietors of the ship, from whatever motive, were authorized to insist that the officers of the crown had no right to enter the ship, but were driven to their action on the breach of the contract, infinite and irreparable mischief might be done to the public service by the delay."]

Now, let us look to the covenants in the present charter-party, all of which, in my mind, are perfectly inconsistent with the notion that the ship was actually parted with by the original owner.

It is true, in the outset, the owner states he *has granted and to freight let*, and that the freighter *hath hired and to freight taken*; but these instruments are all to be taken together, and we are to see whether, upon the whole, the parties intended to part with the possession. These words, or nearly the same, are to be found in *Yates v. Railston*; and yet it was held, in that case, that there was a parting with the ship.

In *Morgan dem. Dowding v. Bissell*, 3 Taunt. 65, it is said, "When the party enters into that, which on the face of it appears to be an agreement, though there are words of present demise; yet, if you collect on the face of the instru-

ment the intent of the parties to give a future lease, it shall be an agreement only." And in *Soares v. Thornton*, 7 Taunt. 640, Lord Chief Justice **GIBBS** says, "The words *let to freight* I pay no regard to." The truth is this, these words are strong, when coupled with other circumstances in the instrument, to show the intent; but they are by no means conclusive.

The owner provides, that the ship shall be "well manned, tackled, apparelled, and furnished for the voyage hereinafter mentioned;" and that "the master, &c. is to receive and deliver the goods." How could he receive but into the owner's possession; and how could he deliver out, if the goods were not in his possession? *These covenants would be perfectly nugatory if the freighter [437 had the entire possession of the ship; for, then, he would receive, stow, and deliver, as and when he pleased. "The ship's boats to be assisting, properly manned, provided no impediment is thereby to be made in carrying the exclusive operations or duties of the ship." What duties of the ship could be inconsistent with those of an absolute owner *pro hac vice*? Notice, too, is to be given to the freighter's agents of the time of loading,—treating him and the ship owner as distinct persons.

The mode of payment too is material, evidently showing the payment and delivery to be concomitant acts: nay, stronger than concomitant acts; for the delivery of the bills was to precede the delivery, viz. at two months' date, from the day the ship was reported at the custom-house. And this fact differs this case from that of *Crawshay v. Homfray*, 4 B. & A. 50, where the payment was to be long antecedent to the delivery; and, therefore, there could be no lien.

The case, for we are not left to infer it, finds that William Wilson, and the crew of the *Ann*, *were hired* and employed to navigate, and that the *ship* was navigated *at the owner's expense*.

Under all these circumstances, I cannot bring myself to think that the owner here had given up the control of his ship; and, as it seems to me, my opinion is well borne out by a vast variety of cases.

The case of *Tate v. Meek*, decided in this court, appears to be almost in point. It is true, the words "*let to freight*" are not to be found in that case; and I have endeavoured to show that these words are not conclusive to show that the owner has given up all control over the ship, if it can be shown from the rest of the *instrument that such was not the intention; but in all [438 other respects it is decisive. In *Yates v. Railston* the words "*let to freight*" are to be found, and yet the same construction prevailed; and so also in *Yates v. Mennell*, though, in the latter case, these words are not to be found.

Since those cases were decided, the case of *Saville v. Campion* has arisen in the Court of King's Bench; and every word of Lord Chief Justice **ABBOTT**'s opinion bears strongly upon the present case. In that case there were no words of *letting*; but, it was contended, that there need not be express words of *demise*, but that any words plainly showing that the one party is to give up to the other, and the other to take and hold possession for a definite time, are sufficient to constitute a lease; and this, said his lordship, is true. "But, (he continues,) on an attentive consideration of the charter-party in the present case, we find nothing either in its language or in its object, which imports that the merchant charterer was to have the possession of the ship. The whole instrument contains matter of contract and covenant only." Lord Chief Justice **ABBOTT** then reviews the contract, in which is a special clause providing that the freighter may appoint a supercargo, to take upon him the authority of the commander in the stowage of the cargo; but not to interfere with the duties of the commander in any other manner, without his leave; and, after many observations, all tending to show that it was not intended that the freighter should have possession of the ship, he confirms the case of *Tate v. Meek*.

The case of *Bohlingk v. Inglis*, 3 East, 38; *Ibid.* 396, is not immaterial in the present inquiry. There it was held, that where a ship was chartered

for a voyage to Russia, and to bring goods home from the charterer's correspondent ^{*there}, who accordingly shipped the goods on account, and at the risk of the freighter, and sent him the invoices and bills of lading of the cargo, the delivery of the goods on board such chartered ship did not preclude the right of the consignor to stop the goods while *in transitu* on board the same to the vendee, in case of his insolvency in the mean time before actual delivery, any more than if they had been delivered on board a general ship for the same purpose. Now, why was it so held? Because the owner had not parted by such charter with the control of his ship. If he had, a delivery on board such a ship to the use of the vendee of the goods and charterer of the ship, the owner, *pro hac vice*, would, as was contended, have prevented the owner of the goods from exercising his right to stop *in transitu*. But Mr. Justice LAWRENCE, in delivering the opinion of the court, says that the vendee had no control over the ship, and had merely contracted with the master, to employ his ship in fetching goods for him. I may, perhaps, be supposed to run in my opinion counter to *Fowler v. Kymer*, 3 East, 396, quoted by Mr. Justice LAWRENCE. But that case states the very distinction on which I form my opinion; for, in that case, there was a letting of the ship for a term of years to the bankrupts, they finding stock and provisions for the ship; and paying the master, *during which time they were to have the entire disposition of the ship, and the complete control over her*.

It is supposed, that the decision which I, for one, purpose to make, is in direct contradiction to the opinion of this court in *Hutton v. Bragg*, in which I myself concurred. I certainly did concur in the judgment there given; but I hope, if I discover that I have at any ^{*time} erred in judgment, I, in common with my lord chief justice, who has so well expressed himself on the point, and my brothers, shall have the manliness with cheerfulness to avow my error. I am sure, if I do not, my conscience will be ill at ease. Whether my present opinion is counter to that, it is not, therefore, my present business to inquire; but of this I am quite satisfied, that the opinion there delivered by Lord Chief Justice GIBBS, Lord Chief Justice DALLAS, and myself, proceeded upon the notion that there was an entire letting and parting with the possession of the ship; and then it falls within the principle of the rule which I stated in the outset. That this was so in all our opinions is clear from our decision in *Tate v. Meek* so shortly afterwards, when the case of *Hutton v. Bragg* was fully under our consideration; and this struck the mind of the Lord Chief Justice ABBOTT in giving judgment in *Saville v. Campion*, for his lordship says, "The case of *Hutton v. Bragg* was in terms of letting to hire." Whether that case was well or ill decided is not for me to say, (properly, I am sure it was intended to be) but, upon this case, I am satisfied (though not so perfectly as I should be, if I had the good fortune to concur with his lordship) that the plaintiffs are not entitled to recover.

BURROUGH, J. Before I give my opinion on the main point in this case, I have some observations to make on some other matters which have arisen in the course of the argument.

First, I think, that if a lien ever existed, it has not been divested by means of any thing in the charter-party coupled with the acts stated in the case. The stipulated freight was to be paid by bills, one-quarter of it by a good bill or bills, on a right delivery of the cargo at ^{*}Newfoundland, at sixty days' sight: The remainder by a good bill or bills at two months from the day of the ship's report inward, in the port of London.

The first bills were given, but dishonoured by the bankrupt when they became due, on the 26th of August, 1815. The second set of bills were never given, nor were any tendered. As to this, the first act, the giving or tendering these bills, was to be done by the freighter or his agents. This, therefore, does not affect the defendant's case.

In the next place, the lien has not, I think, been divested, by a delivery of the cargo; for, on the day the ship was reported at the Custom-house, and, consequently, before any delivery, the defendant gave notice to the directors of the West India docks, not to deliver the goods without the orders of Messrs. Harrison and Betts, who, afterwards, under the defendant's employment, received the freight from the consignees of the goods.

It has been urged, that the person who put the goods on board at Demerara, (on which this freight arose) were strangers to the charter-party. In answer to this, I am of opinion, that they cannot be so considered: for, the goods to be shipped on board at Demerara, were by the charter to be such, as the freighter or his agents should send. The shipper of these goods, therefore, must be taken to have acted under the authority of the freighter, and must be deemed to have notice of the charter-party and its contents.

As to the main point, it appears to me that, in former cases of this kind, too much stress has been laid on a supposed analogy between the words "hath granted, and to freight let," and "hath taken to freight," in charter-parties; and the words, "hath granted and to farm let, &c." in leases of land and houses.

*When the nature of the transaction, and the words of the charter-party are considered, I am of opinion that the construction contended for, namely, that the possession of the ship passed to the charterer, cannot be supported. [*442

The words are "hath granted and to *freight* let, &c." What then was the object in view? It was to engage the use of such parts of the ship, as are used for the stowage of goods, and not to put the owners of the ship out of possession of the ship, which possession they actually had by their master or commander; and the mariners hired and employed by them. The words of the charter-party, show this to have been the intention, and there appears to me to be no reason for extending the construction farther, excepting it be for the purpose of depriving the owners of their lien.

As to leases of lands and houses, their nature and object are very different. There, the one party takes the land or house for the purpose of occupation; the land he takes to cultivate, the house he takes for his actual residence, and it is necessary in both cases that he should have exclusive possession.

After the case of *Hutton v. Bragg*, the case of *Yates and others v. Railston*, the same against *Mennell* and others, and *Tate v. Meek*, came on to be tried before me at Guildhall. On its being stated by my brother *Lewis*, that the case of *Hutton v. Bragg* was not satisfactory, I remember to have said, that had I been in court when the latter case was decided, I thought I should have agreed in the judgment there given. But, I have been since necessarily drawn to consider that case with attention: I confess, I think that it is not law; and I am now persuaded, that the true construction of the charter-party, (connecting the object of it, and the language of it throughout,) is such, that it has not the *effect of passing the possession of the ship to the freighter. The consequence is that, in my opinion, the defendant is entitled to judgment. [*443

RICHARDSON, J. I am of the same opinion. By the law of England and of all commercial countries the owner of a ship has a lien on the cargo for his freight; and this doctrine is laid down in many well known books of authority. Agreements may, undoubtedly, be entered into by which the owner may consent to relinquish this right, but the mere circumstance of his entering into an agreement touching the mode in which he shall be paid for freight, will not, of itself, divest him of his right to lien; that can only be excluded by express terms, and there are no such terms in the present charter-party. The questions, then, that arise in this case, are two. First, whether the owner's lien has been excluded by the terms of the charter-party which he has signed; secondly, whether there is any difference in the case, on the ground that the defendant has delivered the homeward cargo, and has received the freight upon

the bills of lading, which freight is different from that due upon the charter-party?

On the first point, the case of *Hutton v. Bragg* presents a difficulty. However, I do not think it necessary to deny the principle laid down in that case, but only the application of the principle. It is quite clear, that decision turned on the assumption that the owner, by the terms of the charter-party, had parted with the possession of his vessel; and, certainly, cases may arise in which such a transfer may take place: as if the owner were to demise a ship for a term of years, and the charterer were to have the appointment of master and mariners, and incur the expense of wages and repairs; but such is not the usual course *444] of proceedings in the mercantile *world, nor is such the common form of charter-parties, which, though they sometimes vary in form, have, in general, no other object than to lend the use of the ship. In *Hutton v. Bragg*, however, the court relied on the words of demise in the charter-party, that the owner "had let to freight," and the charterer "had taken" the ship; and, if it had been the intention of the parties that the entire possession of the ship should pass from the one to the other, those words would have been material. That they are not conclusive to pass the possession, appears from the case of *Yates v. Railston* decided by the same judges who decided *Hutton v. Bragg*. I am aware that in *Yates v. Railston* there were material circumstances which distinguish it from *Hutton v. Bragg*. For instance, in *Yates v. Railston* the bills of lading refer to the charter-party; but, if the words "grant and let" pass the possession, those other circumstances could not prevail them.

The cases, then, show, that words of demise, though material, are not decisive on the question of possession; and, in the case of *The Trinity House v. Clark*, the right of possession was held to result rather from the nature of the service in which the vessel was to be engaged, than from the terms of the charter-party by which she was let to hire. It seems, therefore, that, in the present instance, the question must turn entirely upon what was the intention of the parties as it is to be collected from the whole of the instrument taken together: that is the case also in demises of land, which may take place or not take place either with or without apt words of demise, as shall appear from the whole of the instrument to have been the intention of the parties.

Before I examine the nature of the charter-party now in dispute, I must observe with regard to the cases of **Vallejo v. Wheeler*, and *Soares v. Thornton*, that the result of those decisions is no more than that, in respect of the offence of barratry, the freighter may be deemed ship-owner *pro hac vice*, whether there be words of demise in the contract between him and the owner or not. But those cases do not at all affect the question of possession, while the cases of *Yates v. Railston*, *Tate v. Meek*, and *Saville v. Champion*, have established that, with or without words of demise, the possession may remain in the ship-owner, for the purposes of lien. Here, then, I shall refer to the terms of the present charter-party, in order to ascertain that intention. Now, though the instrument sets out with general terms of demise, yet every subsequent provision is inconsistent with those terms. The freighter is to send the goods *along-side*, the master is to receive and properly stow them on board, and deliver the cargo *from along-side* to the agents or assigns of the freighter; so that the owners of the goods are not so much as to enter the ship. The boats are to assist the freighter, but not to the interruption of the regular duties of the ship. The ship-owner might, if he liked it, have sailed himself as master, and the master's possession was in effect that of the ship-owner, so that the possession thus remaining in him, there is nothing to exclude the general law which gives him a lien on the cargo towards the amount of his freight.

Upon the second question it is not necessary to hold that the goods of strangers are liable for all the freight due on the charter-party, exceeding the freight mentioned in the bills of lading. It is true, that, according to the decision in

Paul v. Birch, the owner has not a lien on the goods mentioned in the bills of lading for all his freight due on the charter-party, but he is entitled to the freight on the bills of lading, in preference to the "freighter"; and, in the present instance, the owner has neither asked nor received more than was due [446] from each consignee, for the conveyance of his goods. The owner has a lien on the goods mentioned in the bills of lading, as a security for his freight due on charter-party, to the extent of the freight on the bill of lading. But, it has been said, that his lien on the goods was, at all events, lost by the delivery of them to the consignees. Undoubtedly, if a party loses possession of the article on which he has a lien without enforcing payment of his demand, his lien must cease to have existence. Here the owner was bound to deliver the goods on the payment of that freight being made; if, then, he had a lien on the goods, and was bound to deliver them on the sum being paid, to the amount of which his lien extended, it would be absurd to deprive him of the very sum obtained by the assertion of his right to a lien; as he had a lien to the amount of the freight due on the goods, he had a right to retain the money received in respect of that freight, and it seems to me, therefore, that there must be judgment for the defendant.

Judgment for the defendant accordingly.

*FRANCIS GUNTON v. NURSE.

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A. sued B., in trespass for taking a filly; B. justified that the filly belonged to C., and was taken by C.'s command. Verdict for A., with damages, subject to an award by D., to whom the filly was delivered with the consent of A. and C., in order that D. might determine, in a given time, whether the filly was marked with a certain scar; in case the scar should appear, the verdict for A. to stand. D., by his award in due time, stated that the scar had appeared, and ordered the verdict to stand. Ten days after, C. demanded the filly of A., who refused to deliver it; a month afterwards C. sued D. in trover for the filly: Held, that this detention of the filly by D. did not amount to a conversion.

TROVER for a filly. Lynes had sued Benjamin Gunton in trespass for taking away a filly. Benjamin Gunton justified that the filly belonged to his brother Francis Gunton, and that he, Benjamin, took the filly by his brother's command. At the trial, a verdict was found for Lynes, with 25*l.* damages, subject to the award of Nurse, one of the jurymen, to whom the filly was delivered with the consent of Lynes and Francis Gunton, in order to be kept by him till she shed her coat, when, if a scar should appear near her shoulder on the off side, the verdict for Lynes was to stand; if no scar appeared, a verdict was to be entered for Benjamin Gunton. These were the terms of the order of *Nisi, Prius*, under which the parties submitted to arbitration.

On the 26th May, 1819, when the filly had shed her coat, Nurse made his award, stating, that there was a scar near the shoulder of the filly, on the off side, and ordered the verdict for Lynes to stand, but did not deliver the filly to any one. On the 8th June following, Francis Gunton demanded the filly of Nurse, who refused to deliver it. In a month afterwards, the filly not having been delivered, Francis Gunton commenced the present action of trover against Nurse, which was tried before DALLAS, C. J., Norfolk summer assizes, 1820, where, on the before mentioned facts, the jury found a verdict for Francis Gunton, and leave was granted to Nurse to move to set this verdict aside, and enter a nonsuit. *Accordingly, in the last term, Vaughan, Serjt., having obtained a rule *nisi* to that effect, [448]

Blosset and *Taddy*, Serjts., now showed cause on the ground, that though the filly had been delivered to Nurse with Francis Gunton's consent, yet it had been delivered for a particular purpose, which purpose having been effected on Nurse's making his award, he became *functus officio*, had nothing more to do

with the filly, and had no right whatever to detain it. That, under these circumstances, the refusal to deliver the filly on Francis Gunton's request was a complete conversion, Francis Gunton being the party really interested in the filly, though Benjamin Gunton had been the nominal defendant in the former action, the verdict in which had, together with the award, entitled Lynes to 25*l.* damages ; but neither of them invested him with any title to the filly, which, it was but reasonable, Francis Gunton should have, as he was now bound to pay the 25*l.*, and it could never be intended Lynes should have the 25*l.* and the filly too.

Vaughan, Serjt., in support of the rule, contended that, under the very doubtful circumstances attending the property in this filly, the fact of the arbitrator having detained it for five or six weeks after making his award, did not amount to a conversion ; he ought to be allowed a reasonable time to consider how he should act, and, at all events, the demand should have been made by Benjamin Gunton, the defendant in the first action, or under his authority.

DALLAS, C. J. The only question is, whether the defendant has been guilty of any unlawful conversion, and this is an application which ought not to be favoured in law or justice. Arbitrators would be placed in a *dangerous situation, if they were liable to actions of trover after they had decided according to the best of their judgment. (Here his lordship stated the facts of the case.) In the strictest sense of the order of reference, the arbitrator, after deciding on the 26th of May, that the filly belonged to Lynes, could never be called on to deliver it to Francis Gunton, the present plaintiff. If either of the Guntons were entitled to claim the filly, Benjamin was so entitled, who was the defendant in the preceding action, and liable to pay the damages ; and it does not appear that Francis Gunton ever applied in the name or with the authority of Benjamin, so that, as against Francis, the arbitrator could in no way be charged with a conversion.

PARK, J. I am happy to concur in the opinion just delivered, because, if the court were to come to another conclusion, their decision would have a tendency to discourage the recourse to the useful domestic forum of arbitration. I shall confine myself to the question, whether the defendant unlawfully converted the filly or not, and the period we must look to, in order to answer the question, is the 6th of June ; when, on a demand being made by one of the Guntons, the arbitrator having refused to deliver the filly, must, in effect, be taken to have said, "I cannot deliver the filly, because there is an award which seems to conflict with your claim." This is no conversion, but the result of a reasonable hesitation in a doubtful matter, and, as it is not suggested that the arbitrator was not acting *bond fide*, he is entitled to all the protection the law can afford him.

BURROUGH, J. The arbitrator was not bound to deliver the filly to Francis Gunton, who was no party to the former action ; his refusal, therefore, does not amount to a conversion.

*450] **RICHARDSON*, J. The only question is, whether what passed on the 6th of June amounted to a conversion. The defendant ought, perhaps, to have delivered the filly to Benjamin Gunton ; but it does not appear that there was any request by Benjamin, or that Francis afterwards made another request, armed with Benjamin's authority. There was no refusal to deliver to the family of the Guntons, but only to Francis Gunton alone.

Rule absolute.

THOMSON v. ADAMS.

Under a bill of lading, by which goods were to be delivered "to J. A., nett proceeds paid to H. T., as per advice, or to his assigns, he or they paying freight for the said goods as per charter-party." Held, that the freight was to be paid by J. A., and that H. T. was only entitled to what remained after such payment.

By a bill of lading, certain oranges were to be delivered "to Mr. John Adam," (the defendant) "nett proceeds paid to Hugh Thomson, Esq.," (the plaintiff,) "as per advice, or to his assigns, he or they paying freight for the said goods as per charter-party." The defendant sold the oranges, but the freight and other charges, amounting to more than the sum received on the sale, he paid nothing over to the plaintiff, who, contending that, under the above bill of lading, the freight was to be paid by him the plaintiff, sued the defendant for the money received on the sale. At the trial before DALLAS, C. J., (London Sittings after Michaelmas term last,) the jury found a verdict for the plaintiff, the learned judge reserving it to the defendant to move to set aside this verdict, and enter a nonsuit.

Vaughan, Serjt., having, on a former day, obtained a rule *nisi* accordingly, on the ground that, under this bill of lading, the plaintiff was not entitled to the nett proceeds of the oranges, till the freight had been paid *by the defendant, who, as consignee, was liable to be sued for it, [*451]

Lens, Serjt., now showed cause against the rule, and contended that the defendant was consignee only for the purpose of sale, that the plaintiff was the person really interested in the oranges, and liable to pay the freight; that the pronouns *he* or *they* in the bill of lading could only, grammatically or legally, refer to the last antecedent, which was Hugh Thomson.

Vaughan, contra, was stopped by the court.

DALLAS, C. J. I felt no doubt at the trial, and feel none now; the only question is, which of these parties is to pay the freight? If the words "nett proceeds to Hugh Thomson or his assigns" had not been inserted in the bill of lading, it would have been quite clear, that Adam must have paid the freight. The effect of those words is, that the nett proceeds were to be paid to Thomson; but the nett proceeds are what remains after freight and other charges are paid.

The rest of the court concurring, the rule was made absolute.

WILLIAM SPITTLE v. CHARLES LAVENDER.

[*452]

Where A. entered into and signed an agreement, as agent of B., and B. shortly afterwards signed it with the words, "I hereby sanction this agreement, and approve of A's having signed it on my behalf." Held, that A. was not personally responsible.

ASSUMPSIT on the following agreement: "An agreement had, made, concluded, and agreed upon this 15th day of July, 1817, between Charles Lavender of Elstow, in the county of Bedford, auctioneer, as agent for and on the part and behalf of Samuel Randall of the same place, gentleman, of the one part, and William Spittle of Pinney, in the county of Middlesex, innholder, of the other part. First, the said Charles Lavender, in consideration of the sum of 1500*l.* to be paid by the said William Spittle, as hereinafter mentioned, doth hereby, for the said Samuel Randall, his heirs, executors, and administrators, and every of them, promise, by these presents, that he, the said Charles Lavender, his heirs and assigns, (and all and every other person and persons claiming or to claim any right, title, or interest under him or any other person or persons whomsoever of, in, or to the hereditaments and premises, hereinafter mentioned)

shall and will, at the proper costs and charges of the said Samuel Randall, his heirs, executors, administrators, and assigns, on or before the 4th day of October next, make out and produce a good and clear title to, and at the costs and charges of the said William Spittle, by such conveyances, ways, and means in the law, as he, the said William Spittle, his heirs and assigns, or his or their counsel shall reasonably devise, advise, or require, and well and sufficiently grant, sell, release, convey, and assure to the said William Spittle, and his heirs, or to whom he or they shall appoint or direct, all that, &c. (setting out the property to be sold) with covenants to be therein contained, that the said premises, at the time of executing such *conveyance, are free from all encumbrances and demands whatsoever, and all other usual covenants; in consideration whereof, the said William Spittle, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree to and with the said Charles Lavender, his heirs, executors, and administrators, by these presents, that he, the said William Spittle, his heirs, executors, or administrators, or some of them, on having such good title made out and produced, and the said premises so assigned and conveyed to his heirs and assigns as aforesaid, shall and will, well and truly pay, or cause to be paid unto the said Charles Lavender, his heirs, executors, or administrators, as agent for the said Samuel Randall, as aforesaid, the aforesaid sum of 1500*l.* for the same in the manner following, (that is to say, &c.) but as the conveyance deeds will be executed on the 4th of October next, the said William Spittle is to execute a mortgage of all the aforesaid premises to the said Samuel Randall as a security for the sum of 500*l.* Witness their hands the day and year first above written.

(Signed)
Witness, &c.

CHARLES LAVENDER.
WILLIAM SPITTLE.

I hereby sanction this agreement, and approve of Charles Lavender having signed the same on my behalf. (Signed)

SAMUEL RANDALL."

Plea non assumpsit, as to all but 150*l.* and a tender of that sum. Replication and issue. Lavender was an auctioneer employed to sell Randall's property. Randall was near at hand when Lavender signed the instrument, and himself signed it a few hours afterwards.

The only question in the cause being, whether, on this agreement, the defendant was personally liable, the jury, at the Middlesex sittings after Michaelmas term, found a verdict for the plaintiff, DALLAS, C. J., reserving to the defendant the right of moving to enter a nonsuit.

**Lens*, Serjt., having, on a former day, obtained a rule nisi, accordingly,

Vaughan, Serjt., now showed cause against the rule. The instrument must be construed according to the intention of the parties. It was clearly the intention of the plaintiff to obtain the security of the defendant's responsibility, as well as that of Randall's, and the defendant intended to give that security; if it were otherwise, the instrument would never have been signed by the defendant as agent, when the principal was so near, and signed himself so shortly afterwards. All the operative part of the instrument is in the name of the defendant. And there is sufficient consideration for his consenting to become security for Randall; the defendant was to make out the title, and the purchase money was to be paid into his hands, so that he might at once repay himself for his trouble. The plaintiff would not have been justified in paying the purchase money to Randall, and is, therefore, compelled to sue the defendant for the breach of the agreement. *Appleton v. Binks*, 5 East, 148, shows that one party may covenant for the acts of another; and *Burrell v. Jones*, 3 B. & A. 47, is in point for the plaintiff; in that case, one who undertook to pay as solicitor was held personally responsible: and there is no distinguishable difference between undertaking as solicitor and undertaking as agent.

Lens, in support of his rule, was stopped by the court.

DALLAS, C. J. The question is what was the intention of the parties, and that must be collected from the *instrument, but by a reasonable exposition of the whole as it stands. In order to attain this, we must look to [455] the character of the parties. Lavender is an auctioneer intrusted with the sale of an estate, belonging to Randall. Upon this sale, and in order to obtain a purchaser, he enters into an agreement, in consideration of the sum of 1500*l.* to be paid to him, but to be paid to him as agent of Randall. He does not agree for himself but as agent of Randall; and to make this appear the more clearly, Randall himself signs the instrument, the whole that passed forming only one transaction; considering, too, that Lavender was to gain nothing by the transaction, there can be no doubt that he entered into it as agent only. The cases cited do not apply. The first was the case of a covenant, and the defendant covenanted for himself. In *Burrell v. Jones*, the defendants engaged as *solicitors* of, not on behalf of the assignees, nor was their engagement followed up by any approbation of it on the part of the assignees.

PARK, J. On the general rule of law, namely, that where the principal is known the agent is not liable, there can be no doubt; though it is true that an agent may, under certain circumstances, render himself liable at all events. But it is not merely because he calls himself an agent, that he can become liable, he must so frame the undertaking as to make his additional engagement clear beyond dispute. Here, the signature of the principal, and the sanction given to the act of the agent is conclusive, that he did not mean to implicate the defendant. In *Appleton v. Binks*, the instrument was under seal, and the defendant bound himself: here the defendant only signed, and bound Randall, the vendor. In *Burrell v. Jones*, the court expressly said, that the defendant, as solicitor, had no right to bind the assignees. *Bowen v. Morris*, 2 *Taunt.* 374, is in point for *the defendant. Therefore, under all the circumstances of this case, a nonsuit must be entered. [456]

BURROUGH, J. This was all one transaction, and is no more than an agreement entered into by Lavender for Randall, carried to him immediately, and by him immediately signed and sanctioned. To the name of Lavender, the expression "as agent" is tacked for the very purpose of excluding any personal liability.

RICHARDSON, J. I think there is some obscurity in a part of this instrument, but, taking the whole together, I agree with the rest of the court, particularly on referring to the sanction given by Randall, which was so soon added, as to render the whole but one transaction. By the head of the agreement, it is clearly expressed that Lavender acted only as agent, and further, that he agreed for Randall, his heirs, executors, and administrators; and this distinguishes the case from *Appleton v. Binks*. The whole confusion arises from the name of Lavender being afterwards inserted by mistake for that of Randall; he agrees that the said "Charles Lavender, his heirs, and assigns, and all and every other person and persons claiming or to claim any right, title or interest under him, or any other person or persons whomsoever, of, in, or to the hereditaments and premises," shall make a good title; and this mistake is more manifest from what follows, "at the proper costs and charges of the said Samuel Randall." The intent was, not that Lavender should make title, but that Randall should. After this, the principal sanctions the act of the agent, and there can be no doubt that the whole is one transaction. There must be a

Nonsuit entered.

*457]

BOWLES and Another v. PERRING.

Where the mortgaged estate of a bankrupt is sold under the order in Chancery of 8th March, 1794, at the request of the mortgagee, and the mortgagee is the purchaser at the sale, he is liable, in an action for money paid, to reimburse the solicitor under the commission the expenses of the sale.

ASSUMPSIT for money paid. At the last Dorchester assizes, before GRAHAM, B., a verdict was found for the plaintiffs, subject to the opinion of the court, on the following special case. Richard Messiter, being seised of a freehold manor and estate a Shaftesbury, mortgaged the same, in the year 1812, to the defendant, for 7000*l.* In the year 1816, on a commission issued against him, Richard Messiter was declared a bankrupt, assignees were chosen, and the plaintiffs were appointed solicitors to the assignees. At the time of his bankruptcy, Richard Messiter owed to the defendant the above 7000*l.*, together with a considerable arrear of interest. In order to obtain his money, the defendant, by his attorney, George Score, made application to the plaintiffs, to learn when the next meeting of the commissioners of bankrupt would be held: a day was subsequently fixed, and the defendant's attorney having been informed of the circumstances by the plaintiffs, attended at Bath at that meeting, in order to obtain from the commissioners the necessary order for the sale of the estate mortgaged by Richard Messiter to the defendant. The meeting was also attended by the plaintiff's clerk, and the defendant's attorney signed a memorandum, which, (after reciting the mortgage to the defendant, the fact of the mortgage money and interest being unpaid, that the defendant was desirous the estate should be sold, and the proceeds applied, in the first place, to the payment of the expenses attending the sale, and of the money due on mortgage, with the interest,) prayed the commissioners to direct a sale accordingly. This they are enabled to do *458] in such a case, by *Lord Loughborough's order in Chancery, 8th March, 1794. The commissioners made the necessary order for sale, in which they directed the money to arise from such sale to be applied, in the first place, in payment of the expenses of their meeting preparatory to such sale, and attending such sale, and then in payment of the 7000*l.* and interest. In consequence of this order, an advertisement for the sale of the estate was drawn up by the defendant's attorney, and was sent by him to the plaintiff's to peruse, on the part of the assignees. Advertisements were afterwards inserted in the newspapers, and the defendant's attorney was at the sale declared purchaser on behalf of the defendant, for the sum of 4457*l.* The defendant's attorney prepared a draft of conveyance, and sent it to the plaintiffs for their approval, on the part of the assignees; the draft being ultimately approved of, the plaintiffs procured its execution. The plaintiffs proved the payment of 2*l.* 8*s.* for advertisements of sale, and 20*l.* 2*s.* for the attendance of commissioners.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover; if so, the verdict was to stand, but otherwise a nonsuit to be entered.

Bosanquet, Serjt., for the plaintiffs, argued, that under the order in Chancery, the defendant was not entitled to the proceeds of the sale of the mortgaged estate, till the expenses of that sale had been deducted. The whole proceeding being for the benefit of the mortgagee, the object of the order in Chancery was to throw the expense on him, and not on the creditors under the mortgagee's commission. It was the duty of the solicitors under the commission, to pay the expenses of the sale, and had the estate been sold to any other than the defendant, the purchase-money would have been *paid to the plaintiffs, or *459] to the assignees, who could only have given the defendant the residue, after deducting the expenses; the defendant could not elude the rule, or stand in a better situation, by purchasing the estate himself.

Pell, Serjt., for the defendant, contended, with respect to 2*l. 8s.*, the expenses attending the sale, that the defendant, being already entitled to the estate by the mortgage deed, could not be called on to pay any thing on buying it in at the sale, the expenses of which ought to be borne by the creditors under the commission, as they would have been benefitted if the estate had produced more than the money lent on mortgage; and that there was no request, express or implied, by the defendant, for the plaintiffs to pay this money.

But the court was clearly of opinion, that, under the order in Chancery, the plaintiffs were bound to pay these expenses, and, not having received the purchase-money for the estate, were entitled to demand repayment of them from the defendant. *BURROUGH*, J., observing that the sale was for the benefit of the defendant, as it enabled him, if the estate turned out to be insufficient to pay the mortgage-money, to prove the difference under the commission; that this mode of proceeding was more expeditious and beneficial than foreclosure, and that, at all events, the defendant having adopted it, was bound to take it with all its incidents.

Pell also argued that the defendant was not liable for the fees paid to the commissioners, as it did not appear that the meeting was held at the defendant's request, or for his business specially.

PARK, J., and *BURROUGH*, J., (who said they had been commissioners of bankrupt for many years) *entertained no doubt that the defendant was under [*460 the finding of the jury, (which precluded the court from entering into the *quantum*) liable to reimburse the plaintiffs these charges also, as every meeting of commissioners, in which the accounts of an individual were examined for his own benefit, constituted a special meeting as to that individual, although other business was transacted the same day. But,

DALLAS, C. J., and *RICHARDSON*, J., expressing a wish that the fact should be ascertained, whether the meeting in question was or was not at the express instance of the defendant, and for his especial business: the plaintiff, in order to end the cause, consented to abandon any charge for fees to the commissioners beyond what they would have been entitled to on a general meeting, and a verdict was entered for 5*l. 8s.*

CHILDS v. MONINS and BOWLES.

A promissory note, by which the makers, *as executors, jointly and severally, promise to pay on demand, with interest*, renders them personally liable.

ASSUMPSIT on a promissory note; counts for money paid, money had and received, and on an account stated. Pleas for *Monins*, first, general issue; secondly, *actio non*; because heretofore, to wit, on, &c., at, &c., the defendants were the executors of the last will and testament of Thomas Taylor, deceased, and as such executors they made the promissory note mentioned, in the words following (that is to say,) "Ringwould, 28th December, 1816, as executors to the late Thomas Taylor, of Ringwould, we severally and jointly promise to pay to Mr. Nathaniel Childs the sum of 200*l.* on demand, together with lawful interest for the *same. J. Monins, Phineas Bowles, executors." [*461 The defendant *Monins* further pleaded *plene administraverunt præter*. Plea for the defendant *Bowles*, general issue. Replication, joining issue with *Monins* on his first plea, and with *Bowles* on his plea. Demurrer to the second plea of *Monins*, for the following causes: that the defendants have, by the note mentioned, made themselves personally responsible to the plaintiff; and that the said defendants have in and by the said note admitted, that they have assets in their hands for the payment of the said note; and that it does not appear that the said note was given for a debt of the said Thomas Taylor, but may

have been given for a debt of the said executors, since the death of Thomas Taylor ; and, for that, the defendants have promised, in and by the said note, to pay the sum of 200*l.*, with lawful interest ; and the said defendants could not, in their representative capacity, become liable for the interest due on the said note ; and, for that, the defendants have become personally liable, because they have severally and jointly promised to pay, with interest, the sum in the said note mentioned ; which note gives a right of action against the executors of one of the defendants who shall first die, and on that event against the other defendant, as the survivor ; and the last-mentioned executor could not be liable, or sued as executor of Thomas Taylor ; and that the second plea should have been pleaded in abatement, and not in bar ; and that the second plea is in other respects uncertain, informal, and insufficient. Joinder in demurrer.

Taddy, Serjt., in support of the demurrer. The promise to pay is an admission of assets ; and as the payment was to be made with interest, a payment at a future day must be implied. This constitutes a *forbearance to sue [462] on the part of the plaintiff, which forbearance raises a sufficient consideration for the defendants charging themselves. It has been expressly decided, that if an executor promises to pay the debt at a future day, it becomes his own debt, to be discharged out of his own estate. *Goring v. Goring*, Yelv. 10 ; *Trewinnian v. Howell*, Cro. Eliz. 91 ; 2 Wms. Saund, 137 b.

Vaughan, Serjt., *contra*. The executors are not personally liable, because they expressly promise as executors, not in their own right ; and there is no sufficient consideration for a promise in their own right. The circumstance of the promise having been made in writing, does not alter the case ; for the statute of frauds, in enacting that an executor shall not be personally charged, except by his own writing, has not enacted that even by such writing, he shall be charged in cases where he would not have been liable at common law. *Rann v. Hughes*, 7 T. R. 350, n. The promise to pay at a future day should, in order to charge the executor, be express, and not merely deducible by inference.

Taddy, in reply, was stopped by the court.

DALLAS, C. J. It has been urged that the defendants cannot be personally liable, because this is only a promise to pay as executors. Whether or not the promise be such, must depend not on those words alone, but on the words of the whole instrument taken together ; and what are they ? "As executors to the late Thomas Taylor, of Ringwould, we severally and jointly promise to pay to Mr. Nathaniel Childe the sum of 200*l.* on demand, with lawful interest for the same." Take first the words "on demand :" suppose a demand had been made immediately ; do not the executors by subjecting themselves to such a demand, admit they have assets to satisfy it ? If they meant to limit their liability, why did they not add to the words *as executors*, the words "out of the estate of Thomas Taylor." But they promise absolutely, and further add an engagement to pay interest ; when, therefore, by the engagement to pay interest they have induced the plaintiff to suspend his clear and admitted demand, by so doing they make the promise personal and individual. The plea further says, they have fully administered, so they may have done at the time of plea pleaded ; but they do not say they had no assets at the time the note was given. If executors were not liable on such a promise, they would be enabled, by making such a promise, to defraud any individual among their testator's creditors. This too is a promise, which, from the circumstance of interest being added, necessarily imports a payment at a future day, and an executor promising to pay a debt at a future day, makes the debt his own.

PARK, J., concurred.

BURROUGH, J. The plea is inapplicable to the count. The insertion of the words "as executors" cannot alter the case, if, on the whole instrument, the parties appear liable. That is clearly the case in the present instance ; for, by promising to pay on demand, the defendants admit assets ; and, by promising

interest, they show in effect that the debt was to be paid at a future day; as they could not charge the estate of the testator with interest, they must pay it out of their own pockets.

RICHARDSON, J. We must look at the whole instrument, not confining ourselves to the words "as executors;" and from the whole instrument it appears that the defendants are personally liable. They promise severally and jointly, which is not usual with executors. They promise to pay on demand, and with interest, which is clearly a compensation for forbearance. It may be true now, that they have fully administered, but that is no answer to the plaintiff, who was entitled to be paid in 1816. *Goring v. Goring* is in point: but there are other cases, *Barry v. Rush*, 1 T. R. 691; *Worthington v. Barlow*, 7 T. R. 453.

Judgment for the plaintiff.

NICHOLL v. BROMLEY.

If the defeasance on a warrant of attorney state it is given to secure the payment of a sum ~~on demand~~, and, in case default shall be made, then judgment to be entered up and execution issue, an actual demand must be made; and a proposal to settle amicably does not amount to such a demand.

THE defeasance of the warrant of attorney in this case was as follows, "The within warrant of attorney is given by the within-named W. Bromley, to secure the payment of the sum of 1000*l.* on demand, and in case default shall be made, then judgment may be entered up hereon, and execution issue for the said sum of 1000*l.* or so much thereof as shall be then due, together with all costs," &c. The plaintiff's attorney waited on the defendant to induce him to settle matters amicably, which attempt having failed, he issued execution the next day.

Onslow, Serjt., having obtained a rule to set aside this judgment, *Vaughan*, Serjt., showed cause against the rule, and argued, that the expression "payment on demand" was only formal, as in a bond, and that the process of law ^{*was of itself a sufficient demand.} At all events, the attempt to settle amicably amounted to an actual demand.

But the court thought it appeared from the stipulation, that execution should not issue till default had been made, that an actual demand was intended by the parties, and that no demand was shown to have been made.

LEIGH v. SHEPHERD.

An avowry by one of several co-heirs in gavelkind in his own right, with a cognisance as bailiff of the other co-heirs, is sufficient, without averring an authority to distrain from the other co-heirs.

One of several co-heirs in gavelkind may distrain for rent due to him and his companions without an actual authority from his companions.

THIS was an action of replevin upon a distress for rent; and the questions, which were argued, arose on the fifth and seventh avowries and cognisances. By the fifth, the defendant avowed in his own right, alleging, that John Brenchley and others held one undivided fourth-part of the premises, as tenants to the defendant, at the yearly rent of 16*l.*, and that one undivided fourth-part of the 16*l.* of that rent, for one year was due and in arrear to the defendant. By the seventh, the defendant avowed in his own right, and made cognisance as bailiff of Edward Shepherd, Henry Shepherd, and Frances E. M. Shepherd; alleging,

that the said John Brenchley and others held the premises as tenants to the defendant, and the said Edward, Henry, and Frances E. M. Shepherd, at the yearly rent of 16*l.*, and that 16*l.* for one year's rent, was due and in arrear to them. The plaintiff, by his plea in bar to the fifth avowry, denied the tenancy in manner and form, &c. By his first plea in bar to the seventh avowry and cognoscience, he denied the tenancy in manner and form, &c., "and by his *466] second plea in bar to the same, he denied that the defendant was the bailiff of the said Edward, Henry, and Frances E. M. Shepherd. By the special case, it appeared, that the estate was of gavelkind tenure; that John Brenchley, and others, held the same as tenants to one Mary Shepherd in her lifetime, at the yearly rent of 16*l.*; that, on her death, the estate descended to the defendant, and the said Edward, Henry, and Frances E. M. Shepherd, as co-heirs in gavelkind; that the tenancy continued; that one year's rent was due at the time of taking the distress; and, that the defendant was not authorized by Henry Shepherd to distrain for him, but was authorized by the other co-heirs.

The case was argued by *Blossett*, Serjt., for the plaintiff, and *Taddy*, Serjt., for the avowant.

Arguments for the plaintiff. There is a great difference between the rights of co-parceners and joint-tenants, as well with respect to the power of distraining, as in other matters; and though one joint-tenant may distrain for the whole rent, and, without showing authority from his companions, avow for the whole, the present avowant being a co-parcener, has no such right. A joint-tenant may distrain and avow for the whole, because he has a unity of interest with his companion, and an entirety in the whole estate, "*totum in communi, nihil separabitur,*" Bracton, Lib. 5, tract. 5, c. 26, fo. 430, he is seised *per myself per tout*; and though, in form, he should avow in his own right, and as bailiff to his companions, it is not his character of bailiff, but his character of joint-tenant, that entitles him to distrain, per *Holt*, C. J., 5 Mod. 72, in *Pullen v. Palmer*. But the unity and entirety of interest which alone entitle the joint-tenant to distrain without *the authority of his companion, do not *467] exist in the case of co-parceners; for though parceners constitute one heir, and have an entire possession as against strangers, they have separate interests, and distinct freeholds as against each other; one may infest the other; and if one dies, his share descends to his heir; there being no benefit of survivorship as with joint-tenants, Co. Lit. 164 a, one may be barred by the statute of limitations, while the other is saved by a disability, 2 *Taunt.* 441; *Roe, d. Langdon, v. Rowlston*. Mere *unity* of possession can no more entitle one parcener to distrain for his companion, than one tenant in common. It would be a great hardship too, if one parcener should, without the knowledge or consent of his companion, distrain; for the statute of limitations might operate before they came to an account, and the companion be deprived of all remedy. There is no authority directly in point, as all the cases from the year-book, 15 H. 7, p. 17, pl. 11, downwards, are cases of joint-tenants, not of parceners.

Arguments for the avowant. It is true that parceners have separate freeholds for some purposes, but these are only for the purposes of real actions, and making a seffiment, Blackstone's Comm. B. 3, c. 10, p. 149: in all possessory actions, they stand in the same condition as joint-tenants; and one has in most cases authority to act for the other, as in the case of an entry, 1 *Lutw.* 754. The case in the year-books is cited from *Brooke* by *Viner*, 4 *Vin. Abr.* Bailiff D. pl. 4, as applying to co-parceners, which at least shows what was the opinion of *Viner* on the subject. In *Stedman v. Page*, 5 Mod. 141; S. C. Carth. 364, it is expressly said, that one *co-parcener cannot make an avowry *468] for a moiety, but must avow in her own right and as bailiff to the other. To the same effect is *Stedman v. Bates*, 1 *Ld. Raym.* 64. There is no hardship in allowing one parcener to distrain for the whole, because his companions

may claim their shares of him, and if they cannot trust each other, they may have partition. On the other hand, if they were deprived of this power, the tenant would be subject to the inconvenience of several distresses.

Argument in reply. It does not appear from *Stedman v. Page*, or *Stedman v. Bates*, that the avowant is entitled to avow as bailiff, without the authority of his co-parcener for so doing; it is only laid down generally, that the avowry ought to be joint, which may be readily admitted, provided the parties agree together.

DALLAS, C. J., now delivered the judgment of the court, and, after stating the pleadings and facts of the case as above set forth, proceeded as follows: Upon the argument the learned counsel for the defendant has not much insisted upon the fifth avowry: and the case of *Stedman v. Bates*, (reported in 1 *Ld. Raym. Rep.* p. 64, and other coteemporary reporters,) and the principles of law on which that case proceeded, are decisive against that avowry. It is not true, as therein alleged, that the tenants held one undivided fourth-part of the estate as tenants to the defendant, the law considering the tenancy to be a tenancy of the whole, held under the four parceners as forming one heir. There is no difference in this respect between parceners at common law, and co-heirs in gavelkind, "the latter being only parceners by custom, and so" [*469] considered by Littleton, s. 241, and s. 265.

The principal question argued has been, whether one of several parceners has a sufficient authority in law, by reason of his interest in the rent, to make cognisance, as bailiff, of his co-parceners, without any actual authority given by them.

No decided case has been cited on this point: but a *dictum*, in the year book of 15 H. 7, 17 a, has been relied upon, where it is said, that "if two men have a joint-rent, and, the rent being in arrear, one distrain, and the tenant bring replevin, he ought to make avowry and cognisance as bailiff of his companion; and because he has an interest in the rent, his being bailiff is not traversable." It has been observed on the part of the plaintiff, that this *dictum* applies rather to joint-tenants than to parceners: but it is remarkable, that Lord C. J. BROOKE, in his Abridgement, *Traverse*, 118, cites it as applying to parceners; and it appears to us to be equally applicable to both; for both have a joint-rent, there being in both cases but one rent; and each parcener, as well as each joint-tenant, is interested in that joint-rent.

In this view, the case of *Pullen v. Palmer*, 5 Mod. 72, which was a case of joint-tenants, becomes a considerable authority, where it was held, that one joint-tenant cannot avow for the whole rent; but it was laid down by Lord C. J. HOLT, that he may distrain for the whole, but must avow in his own right, and as bailiff to the rest, and that he may distrain for the whole in point of interest, and needs no authority from the rest to distrain, but may do it by law. And in the same sense, we think is to be understood the *dictum* in *Page v. Stedman*, Carth. 384, "that when one parcener distrains, she must avow in *her own right, and also as bailiff to her sister for the entire rent," namely, [*470] that she may do so without any express authority from her sister.

It is not necessary to decide, whether the authority which the law gives to each joint-tenant and parcener, in point of interest, to distrain and avow for himself and the rest, is such an authority as the others could not countermand, if they should think proper so to do. It is sufficient that no such countermand or express dissent appears in this special case, but only an absence of express authority. This we think immaterial, inasmuch as the law gives the necessary authority, which is sufficient to support the allegation contained in the seventh avowry and cognisance, that the defendant was bailiff of his three co-parceners. The rent, when recovered will, of course, be received by the defendant for the equal benefit of his three co-parceners, as well as of himself.

Judgment for the defendant.

REGULA GENERALIS.

(HILARY TERM, 1821.)

WHEREAS, by the common consent rule in actions of ejectment, the defendant is required to confess lease, entry, and ouster, and insist upon his title only. And whereas, in many instances of late years, the defendant in ejectment has put the plaintiff after the title of the lessor of the plaintiff has been established, to give evidence that such defendant was in possession (at the time the ejectment was brought) of the premises mentioned in the ejectment, and for want of such proof, has caused such plaintiff to be non-suited. And whereas such practice is contrary to the true intent and meaning of such consent rule, and of the provisions therein *contained for the defendant's insisting upon the title only. It is therefore ordered, that from henceforth in every action of ejectment, the defendant shall specify in the consent rule for what premises he intends to defend, and shall consent in such rule to confess upon the trial, that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was at the time of the service of the declaration, in the possession of such premises ; and that if, upon the trial, the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case to be taxed.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

END OF HILARY TERM.

VOL. VI.

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v2



CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,

IN

Easter Term,

IN THE SECOND YEAR OF THE REIGN OF GEORGE IV.

IN THE HOUSE OF LORDS.

SMITH v. DOE dem. Earl of JERSEY and Others.

Devisee for life, with a power enabling her, in consideration of marriage, to revoke the uses limited to her, and to appoint to such uses, and with such powers and provisoos, and in such manner as was by her afterwards done, by a deed of settlement, in consideration of marriage, revoked the uses, and appointed the lands, to hold to the use, after the marriage, of her husband for life, *sans waste*; and after his decease, to the use of herself for life, *sans waste*; with remainder to divers other uses, for the benefit of the issue of that marriage, and also of the issue of the appointor; remainder as she should by will appoint, with remainder to the use of herself in fee. The settlement contained a power for the husband and wife, from time to time, when in possession of the premises so limited to them for their lives, by indenture to demise such premises as then were leased for lives, or for years determinable on lives, to any persons, in possession or reversion, for one, two, or three lives, so as there were not thereon any greater estate or interest subsisting at any one time, than what would be determinable on the dropping of three lives; and so as there were reserved the ancient and accustomed yearly rents, duties, and services, or more; or as great or beneficial rents, duties, and services, or more, or a just proportion of such ancient or the then reserved rents, &c. (except heriots, which might be varied at will;) and so as there were contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved: and also, by indenture to demise any of the premises for any term absolute, not exceeding 21 years, in possession, and not in reversion; so as there were reserved so much, or as great and beneficial yearly and other rent and rents, and other services proportionably, as then were therefore paid and yielded, or the best and most improved yearly rent and rents that could be reasonably had or obtained for the same, without taking any fine; and so as in every such lease there were contained a clause of re-entry, in case the rents reserved were unpaid by the space of 28 days: and also, by indenture to demise any of the premises wherein and whereupon any mine or mines should be open, or any person should be willing to open any mine, for any term not exceeding 31 years in possession, so as upon every such lease there were reserved such share of the produce, or such yearly rent, as could reasonably be obtained without taking any fine; and so as the lessees were not by any express clause freed from impeachment of waste, other than in the necessary and reasonable working thereof; and so as there were inserted such proper and usual covenants for the effectually winning and working the mines, and smelting the ore, and doing other acts, as were usually inserted in leases of the like nature.

The lands in the declaration mentioned had been and were leased, and were under and subject to a lease, for a term of years determinable on lives. The husband, after the marriage, by indenture, in consideration of the former lease and of 105*l.*, and of the yearly rents, duties, payments, services, articles, covenants, provisoos, and agreements thereafter specified and reserved on the part of the lessees, demised the lands in question for 99 years, if three or either of them should so long live, paying the yearly rent of 2*l.* by equal portions, at Michaelmas and

Lady-day, with a couple of fat capons, or 1s. 6d. in lieu thereof, at the election of the lessor; and also an heriot of the best beast, or 40s. in lieu thereof, upon the death of every tenant dying in possession; and the like upon every assignment, sale, forfeiture, or alienation; and also the lessees yielding and doing constant suit of mill, paying such toll and mulfare as others grinding their corn there should pay. The lease contained a covenant by the lessees to pay the yearly rent of 2l., and the duties, heriots, suits, services, and other reservations, at the time and in the manner limited and appointed for payment and performance of the same, or else the several sums reserved in lieu thereof; with a proviso, that if at any time the rent of 2l., and every or any of the duties, services, reservations, and payments thereby reserved, or any part, should be unpaid or undone by 15 days next over, or after any of the times whereat or wherupon the same ought to be paid, done, or performed, and no sufficient distress or distresses could or might be taken upon the premises; or, if the lessees should leave the premises in decay six months after view had and notice given, or should commit any wilful waste, or grind their corn at any other mill (the lessor's mill being in repair); or if the lessees should assign without license, or if any default should be by the lessee made in the payment or performance of all or any of the reservations, covenants, and agreements thereinbefore on their parts contained, then the lessor, and the person to whom the freehold of the premises should belong, might re-enter. Upon the trial of an ejectment, evidence was received that the usual and accustomed form of leases of the estate contained in the marriage settlement, for lives or years determinable on lives, as well prior as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in this indenture.

Held, that the clause of re-entry in the lease pursued the form required by the leasing power.

2. Held, that the evidence of the former leases was well received.

A WRIT of error having been brought to reverse the judgment given in this case by the Court of Exchequer Chamber, (a) the plaintiff in error prayed *that the judgment of that court might be reversed, and the former judgment of the Court of King's Bench in his favour might be affirmed; for [474] the following among other REASONS.

*1st. Because the intention of the donor of a power is to be collected from the whole of the deed whereby that power is created; from the plan and design of it as well as the words, and also from the circumstances of the property which is by him subjected to the operations of that power; and in the construction of the particular instrument executed under such power, the law will expound it, with an inclination to preserve rather than to destroy the instrument; "*ut res magis valeat quam pereat.*" See *Cother v. Merrick.* (b) "It is the office of a judge to preserve, not to destroy an estate."

2d. Because the only objection raised to the lease, under which the plaintiff in error holds, is, that the proviso for re-entry therein contained is not such as is required by the leasing power under which it was granted by Lord VERNON, as not being absolute, unconditional, and capable of being enforced *instanter* upon every default of payment of rent, on the very day on which such default takes place; but the words of the power do not, as the plaintiff in error submits, require a proviso for re-entry absolute, unconditional, and capable of being enforced *instanter*, such words being only "so as there be contained, in every such lease, a power of re-entry for non-payment of rent." It is undoubtedly a condition *precedent to the due execution of the leasing power, that there [476] should be reserved in all leases granted under such power, "a power of re-entry for non-payment of rent;" but in what terms that power of re-entry is to be reserved, the settlement is wholly silent, and the argument for the defendant in error is, that from the non-expression of any terms in which that proviso is to be framed, it necessarily results, that the comprehensive expression, "a power of re-entry" (which comprehends and includes every proviso of re-entry adapted to the object for which it is required) must be narrowed to one particular proviso for re-entry, absolute, unconditional, and capable of being enforced *instanter* upon every default. But, it is submitted, the expression, "a power of re-entry," is no description of the particular form, though it is of the general object of the condition to be introduced into the lease, and that the language of the leasing power is fully satisfied by a proviso for re-entry such as is contained in the lease now sought to be set aside by Lord Jersey, which, though not an

absolute, unconditional proviso, and capable of being enforced *instanter* upon every default, is nevertheless "a power of re-entry" sufficient for the object for which it was required, such as was in use upon the estate to which the leasing power applies at the time it was created, and such as the general term used in the leasing power, so far from either expressly or impliedly disapproving, seems advisedly to sanction, especially when it is recollect, that in a subsequent part of the same leasing power, as applicable to the rack-rent estates, the donor of the power omits the general and larger term, "a power of re-entry for non-payment of rent," and specifically chalks out the very power to be introduced into such leases, *viz.* "a clause of re-entry, in case the rent to be reserved be behind or unpaid by the space of twenty-eight days after the times thereby respectively *appointed for payment thereof." Thus, in this latter case, where large rents were to be secured, defining the extent of indulgence to the tenant, and furnishing the very clause to be introduced, as contra-distinguished from the more general and comprehensive expression previously used, *viz.* "a power of re-entry for non-payment of rent;" can it be successfully contended, that this expression conveys a perfect idea to the mind, of the nature and form of the power of re-entry required? It points out, indeed, distinctly the wish of those who framed the settlement, that there should be some power of re-entry in all cases of this description, but not the precise terms in which such power shall be reserved. Had the power required a covenant on the part of the lessee, to build a house upon the premises, it would still have been a question—what house; and a lease stipulating for the building a house of given dimensions, and within a prescribed time, must have been judged of by the law as a reasonable or unreasonable compliance with the condition.

3d. If the language of the leasing power has been literally attended to in the lease executed under such power, the next consideration will be, whether the spirit also is preserved, or whether there be any thing in the plan and design of such leasing power, and the circumstances of the property to be leased, which, by disclosing a different intention in the donor of the power, from that which occurs on the mere reading of the words themselves, thereby imposes a different construction upon such words. The leases under the power are of three sorts. First, leases for lives, or determinable on lives which are renewable on fines, and where the rents reserved are nominal; secondly, leases for years, where a rack-rent is reserved; and thirdly, mining leases, in which no reservation of a power of re-entry is required. The lease in question is of the first sort, and the proviso, therefore, for re-entry, rather introduced with a view of enforcing regular acknowledgments of the tenancy, than of securing a succession of large payments at stated periods. It is not improbable, therefore, with such an object, that some discretion should be left to the person by whom the power was to be executed, as to the form of the proviso. If the words of the leasing power allow such discretion, is there any reason on which its exclusion can be founded? Is the security of the nominal rents endangered by it? Are the acknowledgments of a subsisting tenancy less likely to be regular in a case where the property of the tenant, if hazarded by irregularity, is hazarded to so great an extent as that of the loss of a valuable lease for lives held under a nominal rent, than where it consists only of a short term at a rack-rent? On the contrary, considering that two objects must have been present to the mind of the framer of the leasing power; first, the securing the rents to those who were to benefit by them: second, the preservation of the estate in good condition when the lease determined; has not the language of the power been designedly varied, when directing the reservation of the right of re-entry in the two sets of leases? In the leases for lives, where a small proportion of the annual value is to be paid in the shape of rent, and where a distress might be resorted to without injury to the estate, a mere reservation of the right of re-entry is required,

in such manner and form as should be found discreet and beneficial, and adapted to the object in view; but in the rack-rent leases, a precise and well defined clause of re-entry is pointed out, because the interest of both tenant for life and remainderman is materially consulted, in the reserved power of re-possessing themselves of land, for which the lessee is not able to pay the rack-rent within twenty-eight days *from the time of its becoming due, and where a distress taken for such rent, if resorted to, would probably not secure the [479
rent, but certainly injure the cultivation of the estate.

4th. Because, if the literal language of the condition be not violated, and there be nothing in the spirit of the leasing power, giving a meaning beyond the words used, the principle which has hitherto governed in cases of this kind must govern in this case, which is, that where a special clause of re-entry is prescribed by the power, that clause cannot be departed from, even in trivial circumstances, without defeating the lease made under the power; the donor of the power being in this respect the legislator, and having a right to impose any condition precedent he pleases, provided it be not inconsistent with law, and which when once plainly expressed by him, is not subject to any examination of its reasonableness or unreasonableness. But, if no special clause be furnished by him, but merely a direction given that certain leases shall contain "a power of re-entry," then, if a clause reserving the right of re-entry be inserted, the will and direction of the legislator is complied with, unless the power be executed in a fraudulent or illusory manner, which neither law nor equity would hold to be any compliance at all. Such is the true result of *Coze v. Day*, 13 East, 118, explained as that case is by the subsequent decision in this case, when in the Court of King's Bench, of two of the same learned judges who signed the certificate in *Coze v. Day*; for in the last-mentioned case, the power having prescribed a particular clause, that is, in the event of the rent being behind a specified number of days, those learned judges held a proviso for re-entry, which added terms *not used in the particular clause prescribed by the power, to have [480
vitiated the lease. But, in this case, the settlement only requiring "a power of re-entry for non-payment of rent," and the lease containing the clause of re-entry in question, they considered the words of the power to have been complied with, such compliance being not only literal, but not impeachable on the ground of any fraud or contrivance, and, on the contrary, fair and reasonable.

5th. In considering whether the lease be bad on the ground of any excess in the indulgence given to the tenant, where the power, as in this case, prescribes no precise clause of re-entry, it is most material to ascertain what was the indulgence granted in leases of this estate, prior and subsequent to the settlement creating this power. No such inquiry, it may be safely conceded, can be admitted, where the precise clause is prescribed by the power; but where the power is silent as to the particular nature of the condition, if, as it is humbly contended, it follows from thence that some discretion is to be exercised by him who executes the power in framing the condition, the discretion heretofore sanctioned by her, who, if she had spoken, must have been obeyed, is fit evidence to guide the judgment where she has been silent. It seems difficult to maintain by argument, that where, by the terms of the condition, reference is made to prior leases impliedly, as where "ancient" or "accustomed" rents, or rents "as beneficial as the ancient rents," are spoken of, such evidence is not admissible, to ascertain either the propriety of the new rents, as compared with the old rents in amount, or the propriety of the mode in which they are reserved or secured, as compared with the ancient mode of reserving or securing them. But it is said, there is no implied reference in the very words *directing [481
the reservation of the power of re-entry. If, however, the words "a power of re-entry for non-payment of rent" embrace every power of re-entry, properly so called, then some assistance is necessary to ascertain what particular power of re-entry should be introduced, and none better can be had, than that

which the leases prior and subsequent to the settlement furnish, as directing the will of her whose will alone is to be consulted on the occasion; and, though it is clear that her will of to-day cannot be contradicted by her will of yesterday or to-morrow, yet it is equally clear, that those who contend that such will must be the sole guide, must be content to find it elsewhere, if they cannot find it in the power itself, for, however general the power in its terms, it seems not more repugnant to reason to contend, that the execution thereof is thereby left absolutely to the tenant for life, since that would destroy the condition altogether, than to contend that the very generality of the words confines its execution to one, and one only form of priviso for re-entry, and that of the narrowest and most limited form. But upon sound reasoning it must be conceded, that in such case the limit to the exercise of discretion by the tenant for life must be sought for, either in the arbitrary rules of law, or in such facts as are fit to regulate the decision of the law; and as in the same power, for a different object, viz. the reservation of the rent, the settlor has himself impliedly referred to former leases, why may he not be considered also in this particular, as referring to former leases, and therefore framing the power in general terms? Either that must be the conclusion, or some more unsatisfactory source of evidence must be introduced, or there must be no limit to the discretion of the tenant for life, or the power must be narrowed to something less than its terms, by some supposed will of the settlor, not evidenced either by his words or his acts. The *482] evidence therefore admitted at the trial, the plaintiff in error humbly contends, was properly admitted, and the result drawn by the jury a matter of much weight in the consideration of this case.

6th. If the terms of the power be such as to leave the terms of the proviso unfettered by positive direction, there seems little reason to quarrel with the extent of the indulgence, in point of time granted to the lessee; and such has been the concession throughout the argument of this case. Much more fault has been found by the latter qualification of the proviso, by those who have argued for the defendant in error, viz. with that part which restrains the right of re-entry, to the case where no sufficient distress or distresses may be had or taken upon the said premises. The reasonableness of this qualification, as applied to the particular rents reserved in these leases, and the nature of the property leased, has been already pointed out: in addition, however, to those reasons, it is to be observed, that the statute law of this land has not only spoken the same language, plainly and intelligibly, but it may be doubted whether it has not restricted all lessors from exercising any right of re-entry not guarded by this reasonable qualification. The 4th Geo. 2, c. 28, s. 2, provides, that as often as it shall happen "that one half year's rent shall be in arrear," the lessor "*shall and may*," without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the premises; and in case of judgment against the casual ejector, if it shall be made appear to the court that half a year's rent was due before the declaration was served, "and that no sufficient distress was to be found on the demised premises," and that the lessor had *483] power to re-enter, then "he shall be entitled to judgment and possession.

It then proceeds to bar all relief against such judgments, unless upon payment of such rent and arrears, together with full costs, within six months. The interest of the lessor and the lessee are by this statute equally provided for: the former is relieved from the formalities of the old common law entry. the latter is protected against the forfeiture of his interest, in case there be sufficient to satisfy the rent by way of distress upon the premises. The legislature has thus recognised the reasonableness of a provision preventing forfeiture, where there is a sufficient distress, and so far affords a strong argument in favour of the clause for re-entry, contained in the lease now under consideration. But has it not gone further? Do not the words speak imperatively, that no re-entry shall be enforced, where there is such sufficiency of distress? The lan-

guage of the 8 and 9 W. 3, respecting the breaches to be assigned upon bonds, is not so strong; for there the legislature only says the plaintiff "may" assign as many breaches as he shall think fit upon the bond, giving the defendant the opportunity of paying money into court after judgment and before execution. But the courts of law have construed this statute as imperative upon the plaintiff to do what he is there told he "may" do; whereas, in the 4 Geo. 2, the language is "shall and may;" and as in both statutes the object is the same, viz. to relieve the subject from the necessity of seeking the aid of a court of equity against the technical difficulties of the common law, why should not this equitable provision in each statute be construed to be a compulsory provision, and especially in the statute of Geo. 2, where it is introduced with the words "shall and may?" If it be a compulsory provision, applicable to all cases of re-entry, and not confined to cases of re-entry under that statute, then the clause in question conforms itself to *the law and no more: if it be applicable only to cases under the statute, then, by analogy thereto, this [*484] leasing power is reasonably executed, being qualified in its execution by what the law of the land has deemed reasonable, and being, from the terms in which it is penned, open to such qualification.

R. GIFFORD.

CHRISTR. PULLER.

The defendant in error submitted that the opinion and judgment of the Court of Exchequer-Chamber were right, and according to law, and that the same ought to be affirmed, and the original judgment in the Court of King's Bench reversed; for the following, among other REASONS:

1st. Because the leasing power in the marriage-settlement of 1757 (a power granted by a person having the absolute dominion of the fee to a purchaser of a life-estate) expressly requires that the lease shall contain "a power of re-entry for non-payment of the rent thereby to be reserved;" which makes it necessary, it is submitted, that the right to re-enter should attach immediately on the rent being unpaid; whereas the lease, under which the defendant in the ejectment claims, postpones the right of re-entry for fifteen days after the day of payment; thus depriving the reversioner of a part of that benefit, which, by the condition annexed to the leasing power, was intended to be secured to him. If such postponement be allowed for fifteen days, why may it not be allowed for thirty, forty, a hundred, or any other number of days so great as to make the power of re-entry nearly or quite unavailing? Where is the line to be drawn? If it be allowable to deprive the reversioner of any part of that right of re-entry which the creator of the leasing power says he *shall have, of what part may he be deprived? It is submitted, that only two [*485] lines can be drawn, either the tenant for life is obliged to reserve the whole right of re-entry, or no part of it. And, as it is conceived, that the latter rule cannot be supported, it follows that the right of re-entry in the lease should be fully commensurate with that required by the leasing power, and that this lease is void as an execution of that power.

2d. Because the lease in question is liable to the further objection, that the leasing power requires that the lease shall contain "a power of re-entry for non-payment of the rent thereby to be reserved;" whereas the lease contains no such power, but only gives the lord a right to re-enter for the absence of distress for rent unpaid. The meaning of the words of the leasing power is perfectly plain and unequivocal; "a power of re-entry," it is conceived, means something enabling a man to re-enter, and "a power of re-entry for the non-payment of the rent" signifies something enabling a man to re-enter on the occasion, or for the cause of non-payment of rent; now the leasing in question certainly does not enable the reversioner to re-enter on such occasion, or for such cause; inasmuch as the whole rent for any number of years may be unpaid, and yet he

may not be enabled to re-enter. See the case of *Coxe v. Day*, 13 East, 118, where this point was expressly decided.

3d. It is said in support of the lease, that the creator of the power has used very general language, that *a* power is required, without saying what power; and that the power of re-entry in this lease is sufficient, because it is a reasonable power, and was usual on the estate. It is true, the language of the leasing powers is general; *so general, that only one quality is specified, which [486] the power of re-entry is required to have, that it should be for non-payment of rent; but the creator of the power having exacted this one condition only, is certainly no reason why a compliance with that condition should be dispensed with. The leasing power requires that the power of re-entry should be for non-payment of rent, and it does not require that it should be usual or reasonable; why, then, should the leasing power be so construed as to dispense with the former condition, which, by its terms, is annexed to his execution, and to exact a compliance with the latter, which is not so annexed. Besides, it is not found that this conditional clause of re-entry is reasonable, or that it is usual generally; it is only found to be usual on the estate, which is not only, not the same thing as usual generally or reasonable, but may be the direct contrary. The generality of the word *a* (relied on in support of the lease) must certainly exclude a reference to any particular class of clauses of re-entry, such as those on this estate; as nothing can be more opposite to a general word than a word of reference. If this leasing power be construed to require the power of re-entry usual in cases of the lands comprehended in the settlement, although in this particular case this construction will operate to the advantage of the lessee, yet it may in other cases be productive of the greatest inconvenience to him. Suppose a lease under a power, in the terms of this leasing power, to be on the face of it conformable to the power, yet, if this construction prevail, the reversioner will have a right to avoid the lease, if he can show that the clause of re-entry is different from that which is usual on the estate comprehended in the leasing power. The inconvenience to both parties will be extreme, if a lessee cannot be sure that he has a valid lease, by comparing his lease with the power, [487] without inspecting all the *leases formerly granted of lands within the same estate. It is submitted, that what the creator of a power has required, must be done, for this one reason, of itself sufficient, that it is required, and that it is a much safer rule to adhere to that condition which is expressly annexed to the execution of a power by one who has all the circumstances of the property before him, and who has the right to enlarge or narrow the power to any degree, than to substitute for what he has exacted, something which it may be conjectured he ought to have exacted, but has not.

4th. Because the power of re-entry in the lease is not only different from that required by the leasing power, but much less beneficial to the reversioner. Under an absolute power of re-entry, the reversioner would be entitled to succeed in an ejectment, on proving the rent in arrear, a demand made, and the execution of the counterpart of the lease by the defendant. Under a power to re-enter on failure of distress it would be necessary for him to prove, that he had searched every part of the premises demised, and that no distress was to be found, (*Rees v. King*,) Forrest, 19, a matter of extreme difficulty where the rent is small and the premises extensive. A conditional clause of re-entry, which may be an adequate remedy in the case of high rents and lands of small extent, becomes quite insufficient when the rent is small, as is usually the case with ancient rents, and the lands demised of considerable extent. And, as the absolute power of re-entry becomes the more necessary for the lord, in case of small rents for large property, so it becomes the less inconvenient for the tenant, who might have some difficulty, and expect some indulgence to raise a large sum, but can have none *in being ready with a small one. It is indeed [488] universally true, that in order to secure a small demand the remedy

should be more summary and less expensive than is requisite to enforce a large one.

5th. Because it is submitted, that the finding of the jury that the usual and accustomed form of leases of the estate contained in the marriage settlement, was with a conditional proviso of re-entry, ought not to be taken into consideration in deciding this case. The words of the leasing power are, "A power of re-entry for non-payment of the rent thereby to be reserved;" they contain no reference to the former practice of leasing the estate, nor is there any fact stated on the special verdict which raises any ambiguity in them; and it is submitted, that a provision contained in a written instrument, may not be explained or construed by any extrinsic matter, except in two cases only; first, when the provision refers to extrinsic matter: secondly, when its terms contain a latent ambiguity, that is, when in consequence of some matter of fact shown by evidence, it appears that the language of the instrument has more meanings than one, neither of which is the case with the clause in question.

6th. Because, even supposing the former practice on the estate might legally be taken into consideration, it is far from affording any inference favourable to the lease in question. It is not found that the former leases were granted under similar powers. There is nothing to show that the creator of the power was not dissatisfied with the former clauses of re-entry, and did not insert the provision in question for the very purpose of introducing a new one, which might well be, for the reasons stated above. And this is the more probable, because the leasing power, in several instances, expressly refers *to the former practice on the estate, where it was intended that the tenant for life [489] should be guided by it; there is no such reference in the clause relating to powers of re-entry; the inference is, that the practice was not intended to prevail with respect to powers of re-entry.

J. JERVIS.

W. H. MAULE.

The case was argued at the bar of the House of Lords on the 19th, 22d, and 26th of June, 1820, by *The Attorney-General* and *Puller* for the plaintiff in error, and by *Jervis* and *W. H. Maule* for the defendant in error, when the lord chancellor proposed the following question for the opinion of the judges:

Whether, having due regard to the true intent and meaning of the indenture of the 2d July, 1757, according to the legal construction of the several parts of that indenture as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th September, 1803, as the same is stated in the special verdict, is for any and what reasons invalid?

There being a difference of opinion on the bench, the twelve judges, on the 16th and 18th of May, delivered their opinions *seriatim* as follows; and, on the latter day, the lord chancellor and Lord REDESDALE delivered their opinions.

RICHARDSON, J. The case of *Smith against Doe on the demise of the Earl of Jersey and Others*, now pending by writ of error in this house, is an action of ejectment brought in the King's Bench, on the demise of Lord Jersey against Smith for the recovery of certain lands in the county of Glamorgan. These lands by indenture bearing date the 5th day of September, 1803, were [*490] demised by Lord Vernon to Smith, and another person since deceased, for three lives at a rent of 2*l.* payable half yearly at Michaelmas and Lady-day. And Lord Vernon the lessor was at that time tenant for life in possession of the estate, whereof the lands in question formed part, by virtue of a settlement duly made on occasion of his marriage with Louisa Barbara Mansel, bearing date the second day of July, 1757. On the trial of this action, the jury found a special verdict, on which the Court of King's Bench gave judgment for the defendant; which judgment was reversed on writ of error in the Exchequer Chamber: and the cause having been brought by another writ of error before

this house and argued at the bar here, your lordships have proposed the following question for the opinion of the judges. (Here the learned judge stated the question.) I am of opinion that the lease of 1803 is invalid, because I think it is not made in conformity with the leasing power contained in the indenture of 1757.

The leasing power for that class of leases, of which the lease in question is one, requires that "there be contained in every such lease, a power of re-entry for non-payment of the rent thereby to be reserved :" and the question resolves itself into this,—what is the true construction of these words?

In order to decide this, I must first consider, whether the words themselves import and convey any distinct meaning : and I think they do ; I think they mean, that the lessor should have power to re-enter if the rent reserved should not be paid according to the reservation.

One test, and, I think, a fair one, whether such meaning is conveyed by the words of this power, would be to insert in a lease a proviso for re-entry, expressed as nearly as possible in the very words of the power itself, and then to consider what construction a proviso so expressed would require, and whether the meaning *would be sufficiently distinct to be capable of being enforced by a court of justice.

Suppose, then, in the lease of 1803, it had been provided, that it should be lawful for the lessor or person entitled to the rent, "to re-enter for non-payment of the rent hereby reserved." In that case would the person entitled to the rent have been empowered to re-enter, if the rent had not been paid on the days of reservation ? It seems to me, that he would have been so empowered ; and *that* without any delay or condition other than the previous demand required by the common law : for all that he would be bound to prove, in order to justify and enforce his re-entry, would be, that there was a *non-payment* on demand of the rent reserved by the lease.

If this be so, it seems to me to prove that the necessity of waiting fifteen days, and the necessity of providing a sufficiency of distress on the premises imposed by the proviso actually contained in the lease of 1803, are conditions not warranted by the leasing power.

It has been said, that the leasing power requires only "a power of re-entry," much stress having been laid on the indefinite effect of the article *A* ; and it has been further said, that, though such power of re-entry is to be "for non-payment of the rent," yet, that the words "for non-payment," are not equivalent to "on non-payment," but only point at the purpose or object of the power of re-entry, namely, that of securing the payment of the rent.

It appears to my mind, however, that, although the article *A* be indefinite, yet it cannot, in just construction, extend an indefinite meaning to the subsequent words, if they sufficiently import (as I think I have shown they do) a distinct and definite meaning. In this sentence, the word *A* seems to me neither to add to nor to qualify the meaning ; but, that the *meaning would have been the same, if that word had been wholly omitted, and the sentence had stood thus, "so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." And, as to the observations made on the meaning of the words "for non-payment of the rent;" although it is true, that the word "for" does often import the purpose or object, (and so it might here, if the words had been "a power of re-entry for payment of the rent:") yet the same word "for," as often imports the cause or occasion of that which is predicated ; and such I think is its import here, where the words are "a power of re-entry for non-payment of the rent," meaning on occasion of the *non-payment*.

If the words of this leasing power import, as I conceive they do, by themselves, a distinct and definite meaning, I think it follows, that the fact stated in the special verdict respecting the usual and accustomed form of leases of the

estate mentioned in the marriage settlement, can have no legal effect on the construction to be put on these words. Such evidence, I conceive, is never admissible in the construction of a written instrument, unless the words of the instrument itself import a reference to something extrinsic, or unless the words involve some latent ambiguity, that is, an ambiguity not appearing on perusal of the instrument itself, but which becomes apparent on applying its provisions to the subject matter. The words of this leasing power in that part which respects the clause of re-entry, seem to me to involve no latent ambiguity, nor to import any reference to any thing extrinsic; although some former parts of the same leasing power do import such reference, namely when it is required, that the lands to be leased for lives, should be such lands as were in lease for lives at the time of making *the settlement, and that the rents to be reserved, [493] should be the ancient rents, or rents as great and beneficial.

I admit that a court is bound to look at every part of a written instrument, in order to ascertain the meaning of the parties in a particular part. But I think it by no means follows, because this settlement, in respect of the rack-rent leases, expresses that the tenant is to be allowed 28 days for payment, that, therefore, it was intended, in respect of the leases for lives, to give a similar or any allowance of time, which is not only not expressed, but which appears to me, to be at variance with what is expressed.

Supposing, however, it were possible on this ground to get rid of the objection made against the lease of 1803, in respect of the allowance of 15 days; another and still more decisive objection remains, namely, that this lease fetters and confines the power of re-entry to such cases only, where there is a want of sufficient distress; a condition which appears to me, to be equally inconsistent with the power applicable to leases for rack-rent, and to that which is applicable to leases for lives.

The case of *Coxe v. Day*, 13 East, 118, which I think was rightly decided, appears to me to be in point, and I cannot draw any distinction, which is satisfactory to my own mind, from the circumstance that the leasing power *there*, allowed a period of 21 days for payment, whereas the leasing power *now* under consideration as to the leases for lives, expresses no such allowance. It is true, that in *Coxe v. Day*, the case of *Hotley v. Scot*, Lofft. 316. S. C. (a) does not appear to have been cited; and it seems that, in the last mentioned case, a similar objection taken to a lease granted under a power was overruled by the Court of King's Bench: on what ground the court *proceeded, we are [494] not apprized, and being obliged now to make an election between the two authorities, I must express my concurrence with that of *Coxe v. Day*.

It has been suggested, that the statute of 4 G. 2, c. 28, though professedly made for the benefit of landlords, does, in effect, take away their right of re-entry at common law, and confine them in all cases to the statutable remedy thereby given, which remedy can never be exercised without proof, that no sufficient distress was to be found on the demised premises, countervailing the arrears then due. And I think it must be admitted, that the construction of the statute, if it be the true construction, furnishes a sufficient answer to the second objection made to the lease of 1803; for, in that case, the lease has only expressed that which, whether expressed in the lease or not, the statute law has provided.

But I cannot think that this is the true construction of the statute. The object of the statute, as appears to me, both from the recital and the enactments, was to relieve landlords from certain inconveniences, to which they were subject by the law as it then stood, and to give them certain remedies, to which they were not before entitled; but not to deprive them of any remedies or rights, to which they were already entitled by law. It contains no negative or

(a) Mr. Butler's MSS., see note (a,) p. 498.

prohibitory words, which, I think, would obviously have been inserted, if the intention had been to deny to the landlord the future exercise of any ancient right ; and it would, as it strikes me, be a strange construction to hold, that the words apparently intended for the landlord's benefit do, from their generality, operate to extinguish any of his ancient rights ; when, if such had been the intention, it would have been so easy and so obvious to express it. That such, however, was not the intention, I think manifestly appears from this, that, whenever the new mode of "proceeding in ejectment given by the statute *495]" is pursued, the statute declares, that "then and in every such case, the lessor in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made." It refers to the legal demand and re-entry as a still subsisting mode of proceeding, not repealed or affected by the statute ; and thereby shows, that the old mode of proceeding was intended to be left as it was, although the new one, if adopted, is declared to be equivalent for the purpose of obtaining a valid judgment and execution. This, I believe, has always been considered as the intent and effect of the statute ; and, although I am not able to point out any case, where it has been expressly decided, that the statute does not take away the landlord's remedy at common law ; several cases have occurred where landlords have so proceeded without objection on that ground, and it has been taken for granted, that they were well entitled to do so. *Doe dem. Forster v. Wandlass*, 7 T. R. 117, and *Roe dem. West v. Davis*, 7 East, 363, are cases to this effect, and so is 1 Wms. Saund. 286, N. 16.

It has been said, that, if the lease of 1803 be invalidated, the decision will shake many titles. I have no means of knowing whether this observation is well founded, or to what extent. If such should be the consequence, I shall regret it ; but I cannot feel that such an apprehension can afford a legitimate ground for deciding the present case, otherwise than as the words and legal effects of the instruments now under consideration seem to me to require. Upon the whole, therefore, I am bound for the reasons before given, to answer your lordship's question in the affirmative.

*BEST, J. My lords, I am extremely sorry, that I cannot agree with *496] my learned brother who has just addressed your lordships, and to know, that the opinion which I am about to offer differs with those of many of my brethren, for whose judgments I have the highest respect.

The words of the power are, "and so as there be contained in every such lease, a power of re-entry for non-payment of the rent thereby to be reserved." The terms in which it is expressed are general and indefinite. Instruments in such terms are not to be abstractedly and absolutely considered ; but with reference to the nature of the subject to which they relate. They are in law taken to contain such qualifications as are manifestly just and reasonable, and such as, according to practice, have before been introduced in similar cases, and which, not being expressly excluded, must be understood to be within the intent of the parties. This rule of construction is universal : it cannot be departed from without destroying the excellence of the law, which consists in its bearing a just relation to the state of things on which it is to operate. Thus, under contracts to sell goods, in which nothing is said as to the time of delivery, the vendor is not bound to deliver them the instant that the contract is made. Under a contract to perform a particular service, the contractor is not bound to begin his work immediately. In both these cases, the law allows a reasonable time for the performance of the contract. Under contract for service for a year, the law will not compel the servant to serve every hour of the year ; but excepts such a portion of time as is necessary for refreshment and relaxation. So, if there be an established usage, regulating the manner in which a thing contracted to be done, is to be done ; as the time and circumstances of delivering articles

sold, or the payment of the price, or the time for paying *a bill of exchange. Such usage is by law incorporated into the contract without any words of reference to it. [497]

Our books do not furnish many cases on this subject. There are enough, however, to satisfy us that, according to the practice that has long prevailed among conveyancers, the proviso for re-entry in this lease is a sufficient execution of the power. The existence of this practice and its being considered reasonable, account for there being no more decisions of courts on the subject. From the few cases that are to be found, the balance of authority seems to me, to incline much in favour of the validity of this lease. But the authority of the cases in favour of the lease is much strengthened by the practice of that branch of the profession of the law, who have been accustomed to prepare powers and leases under powers. -

The first case is that of *Jones, dem. Bromfield v. Verney*, Willes, 169. Sir John Cowper had been enabled by the act of parliament, to grant building leases for any term not exceeding 61 years, "so as in every such lease there be contained a condition of re-entry for non-payment of rent." The clauses of re-entry in the leases granted by Sir John, were for non-payment of the rent in 42 days after the days of payment. An ejectment was brought in the Common Pleas, to turn a tenant out of possession, who held under one of these leases; but no objection was made (although it stated in the judgment that the case was fully argued) on the ground of the qualification introduced into the lease, by the words "42 days after the day of payment. This is but negative authority, but considering the great learning and industry employed in the discussion of this case, an objection must have been raised if the law had not been considered to be settled, and, if it had not been thought *that the lease was sanctioned by a practice, which no argument could overturn. [*498]

The next case is *Hotley v. Scot.*(a) The words of the power were, that if the rent should be behind or unpaid for 21 days, the lessor should have [*499]

(a) See *ante*, vol. i. 150. This case was quoted by *Moysey* in argument, before the judges in the Exchequer Chamber, from a copy of a manuscript note of Mr. Butler, who has kindly permitted the reporters to give this case to the public.—The following report is copied *verbatim* from that learned gentleman's manuscript:

MICHAELMAS Term, 14th GEORGE III. B. R.

(This case is reported in Lofft. 316, under the name of *Hotley v. Scot.*)

Lord TANKERVILLE v. WINGFIELD and PRITCHARD.

Upon ejectment, the case was as follows. Upon the marriage of Sir John Astley, his lady's estate was settled upon Sir John for life, with several remainders over, which never took effect; remainder to the lady's right heirs. A power of leasing was given to Sir John, such leases to be made for any number of years at the accustomed rent, to take effect immediately in possession, and not by way of future or reversionary interest; and on every such lease there was to be inserted a clause of re-entry, if the rent should be behind for 21 days; the rent to be made payable, and the re-entry to be incident to and go along with the reversion or remainder. In the same settlement, there was also a power of revoking all the uses thereby declared, and appointing new.

Some time after the marriage, Sir John Astley and his lady revoked all the uses of the settlement that were subsequent to Sir John's life-estate, and the powers incident thereto, and declared new uses. There was also a fine levied to the same effect.

21 September, 1766, Sir John made two several leases of this date to the two defendants, Wingfield and Pritchard, for 21 years, conformable to the power he had by the said settlement, and the other deeds and the fine, except that previous to the entry distress was to be made, and it was nearly in the following words: "That if the rent should be behind or unpaid by the space of 21 days, and no sufficient distress or distresses could be had, or if the lessee should assign over the leased premises, (except as therein is excepted) then it should be lawful to Sir John Astley, his heirs and assigns, to enter."

Sir John Astley and his lady being both deceased, the estates are descended upon Lord Tankerville, the plaintiff, &c.

Dunning, for the plaintiff. The court always takes a difference between powers, when exercised by a man upon his own estate, and the exercise of powers by a man upon another's estate,

*500] power to re-enter. The condition in the lease was, if the rent *should be behind and unpaid for 21 days, *and no sufficient distress*, then it

or which he holds in another's right. The first are always construed favourably to the persons making use of this power; the second are taking in a strict light: here it was certainly the second. It was a power to be exercised on the wife's estate, and, in some respect, in prejudice of his wife; and, therefore, to be taken strictly.

1st objection, that the settlement declares, that the power of re-entry should be reserved and made incident to the inheritance of the estate; and, by the lease it is reserved to Sir John Astley, his heirs and assigns. 2d objection, the settlement directs the re-entry so as to be reserved as above, to be made immediately, if the rent should be behind by 21 days. By the lease it is to be preceded by demand and distress.

These are strong, plain, and conclusive objections.

Bearcroft, for the defendants. The remainder man, Lord Tankerville, has, substantially, all the powers he ought to have, or can have. As to the 1st objection, the rent cannot be made payable but to those in remainder or reversion, to which it is inseparably incident. The heirs and assigns of Sir John Astley mean those, who are heirs and assigns to the estate under the settlement, by which Sir John claims the estate. See *Cother v. Merrick*, Hard, 89. Tenant in tail died seized, his son entered and made a lease for 21 years, rendering rent during the term to the lessor, his heirs and assigns, and died. It was unanimously adjudged to be a good lease, and within the 32 H. 8; the opinion of the court being, that the word heirs, being a comprehensive word, it ought to be construed *secundum subjectam materiam*, and to have that which the nature of the deed requires. This is much the stronger in the present case, as Sir John Astley, having joined with his wife in the deeds which raised the limitations, those who take by virtue of those limitations may, in some respect, be said to be the heirs and assigns of Sir John Astley. As to the 2d objection, that the re-entry, which is directed by the power in the settlement to be reserved immediately on the rent being behind 21 days after it is due, is by the lease to be preceded by distress and by demand. The words in the settlement are short and loose, and seem to be no more than a general direction that, in every lease to be made under this power, there should be a clause of re-entry. It is not a formal description what kind of re-entry should be reserved, or of any particular clause of re-entry; it is a direction that the power of re-entry, usually inserted in leases, should be inserted in the leases to be made under this power, in the usual manner. This, I apprehend, a sufficient answer to the objections raised against these leases; each is a verbal objection, and I have given each a verbal answer.

Mr. Dunning, in reply. The distinction I set out with, and the consequence of that distinction, that these leases are to be considered in a strict light, is not denied. And, besides this claim to the favour of the court, Lord Tankerville has that of being the heir at law of the owner of the estate, on which this power has been exercised. Lord Tankerville is neither the heir, nor the assignee of Sir John Astley, he claims by a title paramount to Sir John's. The rent is directed by the settlement to be incident to the inheritance, that is to say, to be to the several limites of the settlement, when respectively in possession. The reservation is to the heirs and assigns of Sir John Astley. They are not limites. This is, therefore, not a proper execution of the power. The case quoted, and the act of parliament 32 H. 8, only show that, if a tenant in tail make a lease according to the statute, and reserves rent to himself and his heirs, the words "heirs and assigns" may be construed to be such heirs as may succeed by force of the entail. This construction can never, in the present case, take in Lord Tankerville, who cannot, in any sense or meaning whatever, be deemed the heir of Sir John Astley or his assigns. It is sufficient to say that, in pleading, he could never be described as such. As to the words being loose, and directing what should be done, and not describing *how* it is to be done, this seems a frivolous distinction. The settlement directs a clause of re-entry to be inserted in the lease; the lease says it shall not be lawful for Sir John Astley to enter as long as there is a sufficient distress or distresses to be taken. Till then, it is postponed. This is contrary to the words of the settlement, and is not, certainly, a proper execution of the power.

Lord MANSFIELD. The two objections to these leases are, 1st, That, by the settlement, the re-entry is to be made incident to the rent; but by the lease it is reserved to Sir John Astley, his heirs and assigns. And, in the event, it has not followed the rent, but gone to the heirs of the lessor, Sir John Astley, while Lord Tankerville is in the lawful possession and receipt of the rents. The 2d objection is, that the clause of re-entry, which, by the settlement, ought to be immediate, is by the lease fettered; being on a previous demand and previous distress. As to the first, by the nature of the power, it must go with the reversion and inheritance. The person who is in the reversion and inheritance, is he that is to enter on the forfeiture of the lease, and no one can enter but he, to whom the rent is payable; for, as Littleton says, no stranger can enter for forfeiture, for a stranger cannot be in by his former estate. If the rent had been reserved for the ferm, as in the case cited from Hardres, still it goes with the inheritance. Heirs and assigns can only mean those who have the reversion and inheritance; otherwise, as is said, 2 Saund. 370, they would be words of surplusage. The clause of re-entry must go with inheritance the same as the rent, for it cannot be reserved to any body but to him who is seized of the inheritance. It was said, that ought to have been worded to the person next in reversion or remainder. The words heirs and assigns are general words, and are as good and quite tantamount to particular words. As to the second, the clause of re-entry is short, with words of course, and does not preclude the operation of law. A re-entry is to enforce the payment of rent, it is an immediate forfeiture of the estate by common law. By statute it cannot be without a want of distress. Therefore, in both points, we agree to support the leases. So the verdict must be entered for the defendants.

should be lawful for the lessor to *re-enter. Lord MANSFIELD in giving judgment, said, "The clause of re-entry is short with words of course, and does not preclude the operation of law—a re-entry is to enforce the payment of rent—by statute it cannot be without distress." The report of this decision is very short. It is probable that it does not give us the very words of Lord MANSFIELD, but we learn with certainty from it, that the court decided the very point now before your lordships in favour of the lease: for the power does not contain a syllable about a sufficient distress; this qualification is introduced into the proviso for re-entry, and yet the court upheld the lease. It is clear, also, that Lord MANSFIELD must have referred to some form of drawing up these powers and clauses of re-entry which were then in use, and have expressed himself, that the power and clause in that case were *agreeable to usual form. He is made to say, "The clause of re-entry is short with words of course." It is most probable that he said, the power was short with words of course; the obvious meaning of which is, that the power was expressed in the terms commonly used in such cases, and importeth that sort of clause of re-entry, which it was then the practice to introduce into leases made under powers; that the only object of the power being to secure the payment of the rent reserved, such qualifications as the law considered reasonable and consistent with this object, were not excluded:—as the legislature had thought the landlord ought not to have any greater facility for recovering possession of the estate, than he had at the common law when there was a sufficient distress on the demised premises, the introduction of such a condition into the clause of re-entry, was but a reasonable qualification. This decision is an authority to show, that reasonable qualifications may be introduced into clauses of re-entry, when the terms of the power are general; and, also, that the qualification most objected to in this lease is reasonable.

That a power expressed in general terms, is well executed by a lease containing a proviso with legal qualifications, is further proved by *Dormer's case*, 5 Co. 40 b. "By special consent of the parties, a re-entry may be for default of payment of rent without demand of it. And divers other cases were put where the consent of the parties shall alter the form and course of the law." Although a clause of re-entry was absolute for non-payment of rent, yet the common law superadded the qualification to that clause, that the rent be demanded on the estate demised on the last hour of the day when it was payable; and, according to *Dormer's case*, the demand of the rent can only be dispensed with by special consent, or, (as it is expressed in *Newdigate's case*, Dyer, 68, "that it shall be lawful without further demand to re-enter.")

If, at common law, a landlord could not recover possession against a tenant holding under a lease, containing a general clause of re-entry for non-payment of the rent without a demand of the rent, surely, when the legislature has relieved the landlord from making a demand of the rent, and substituted, in the place of that demand, the condition, that there be not a sufficient distress on the premises, the law will not allow the tenant to lose his estate, if there be a sufficient distress on it to satisfy the rent due. It will require the same express consent to exclude the condition of there being no sufficient distress since the statute of George the 2d, as was required to exclude the necessity of a demand of rent at common law.

I do not mean to say that, since the statute of George the 2d, a man may not proceed at common law. My argument is, the law annexed the condition of demand of rent before the statute, and as the statute has now dispensed with a demand of the rent, when there is not a sufficient distress, the law will annex the condition of there not being a sufficient distress to a power expressed in general terms; and, therefore, a clause of re-entry containing this condition, is not inconsistent with such a power: otherwise, the tenant would not have the protection which, according to the spirit of the law, he ought to have; for, by

an omission to pay the nominal rent on the day it became due, he might, without notice and with abundance of property on the land to satisfy the rent, be dispossessed of an estate, for which he had paid a large rent in advance under *504] the name of "a fine. This would be making that remedy, which was intended only as a security for the rent, a forfeit trap.

The decision in the Court of King's Bench, in *Coxe v. Day*, is supposed to establish a contrary doctrine. Lord ELLENBOROUGH, during the argument of that case, seems to have intimated an opinion inconsistent with that which I have offered to your lordships. But, my lords, it is not dealing fairly with that great judge to hold him to what he threw out whilst he was forming his opinion, particularly when it is contrary to what he afterwards decided, when the case now before your lordships was in the King's Bench. The wisest of men could not escape the charge of inconsistency, if expressions, which are dropped while the mind is struggling with the different considerations presented by conflicting arguments, are to be recorded. I know not on what ground the court agreed to the certificate which was sent to the Court of Chancery: but, I cannot admit that this certificate is an express authority on the point now under consideration, when the case presents a ground, on which, with the opinion that I entertain on this case, I should have signed that certificate. The power in *Coxe v. Day* was in these words, "So as in every such lease there be contained a condition of re-entry for the non-payment of the rent reserved by the space of twenty-one days." The words of the proviso were, "if the rent should be in arrear for twenty days—*being lawfully demanded*." The words "being lawfully demanded" weakened the landlord's security for his rent, by imposing on him the necessity of demanding it on the last hour of the day on which it became due, a thing always found to be attended with difficulty, and often impracticable, and from which landlords are relieved by the statute of George the Second. Such a proviso could not be sufficient under such a power.

*505] *If authority, my lords, be doubtful, we must recur to principle When property in lands is divided into estates for life and estates in remainder, it becomes our object to secure to the possessor all the advantages which belong to his estate. The mode of doing this is by giving to the tenant for life a power to grant leases for certain terms not determinable with his life. Unless he has this power, the estate will not be cultivated as it ought to be; much less will it be improved; and not only tenants for life, but the public would suffer from the want of such powers. In the granting these powers, care must be taken that, in granting their leases, tenants for life do not prejudice the estate of the remainder-man: possession of the lands must be secured to the tenant, and the rent to the landlord. Considering this as being the object of these powers, judges, in the construction of them, will only have to consider —what did the maker of the power consider sufficient to attain this object? Can any one doubt that the maker of this power would have considered the clause of re-entry in this lease abundantly sufficient to secure the rent? But for the respect which I feel for those learned judges, with whom I differ on this subject, I should have said, without doubt or hesitation, "a clause of re-entry" means in law what these words would in common conversation, viz. such a clause of re-entry as is generally inserted in leases. That this clause answers that description will not, I think, be disputed.

That the principle, on which I found my opinion, is a sound legal principle, is evident from the following cases. In *Holley v. Scot*, Lord MANSFIELD says, "a re-entry is to enforce the payment of rent." In *Wadman v. Calcraft*, 10 Ves. jun. 69, Sir WILLIAM GRANT says, "There is no doubt equity will *506] relieve against the forfeiture; "considering the purpose of the clause of re-entry to be only to secure the payment of rent; and that, when the rent is paid the end is obtained." In *Opey v. Thomarius and Others*, Sir T.

Raym. 134, TWISDEN, J., says, "powers are to be expressed according to the intent of the parties." In *Goodtitle v. Funucan*, Doug. 573, Lord MANSFIELD says, "powers are now a common modification of property in land, and, as such, are to be carried into effect according to the intention of those who create them."

My lords, I shall not advert to some facts which are found by this special verdict, and on which arguments might be offered in favour of this particular case. My opinion is formed on these general grounds: Where the power is expressed in general terms, as it is in this case, reasonable qualifications are not excluded, but may be introduced into the clause of re-entry; and the qualifications introduced into this clause have been acknowledged by the legislature and the course of law to be reasonable. "A clause of re-entry" means the usual clause of re-entry, and the clause of re-entry in this lease is such as is usually inserted in such leases. I believe that it has been much the general practice of conveyancers to insert such clauses, that, if your lordships were to declare this lease invalid, you would destroy the titles of a very large proportion of the landholders in the kingdom. Much of the property in the west is held by leases granted by tenants for life: I know that, in other parts of England, actions are already brought to turn tenants out of possession of those estates on the same objections as are made to this lease. Some of these actions have been brought to trial before me, and now await your lordships' judgment in this case.

*My lords, I have heard the learned judges say, that they would never allow a practice to be set aside, on which the titles to many estates depended, however much they might disapprove of such a practice. If your lordships set aside this lease you will turn a large proportion of the tenantry of England out of estates, for which they or their ancestors have paid large sums of money, and which have been continued in their families by a successive renewal of leases, for as great a length of time as any of your lordships' families have held their estates. The personal property of tenants for life, the fund out of which provision is to be made for the younger branches of families, will be drained to make compensation to the leaseholder for the loss that he has sustained by being deprived of his lease; and, where these funds fail, the families of the leaseholders will be ruined.

I have only further to say, that I see no reason to hold the lease stated in the special verdict invalid.

GARROW, B. The settlement made upon the marriage of Lord Vernon with Lady Louisa Barbara his wife, of the 2d July, 1757, on which this question arises, gives a power of leasing requiring, with respect to property of the nature in question, that there shall be contained in the lease a power of re-entry for non-payment of rent. In this leasing power, no time is specified by way of indulgence to the tenant, as to the payment after the day on which it shall fall due; nor are any other terms required than, that the person, who from time to time shall be in possession of the estate, shall insert in the lease a power to resume the possession for non-payment of the rent.

The lease, granted by Lord Vernon to the defendant and another, contains a clause for re-entry, if the rent *shall be in arrear for the term of fifteen days, and if there shall be no sufficient distress upon the premises to satisfy the rent, and the question is, whether this is a good execution of the power, or, in other words, whether this is such a power of re-entry as was required by the creator of the settlement?

It is observable, that the creator of the power, or those who advised her, knew how to make distinctions as to powers of re-entry applicable to different estates; and, in the case where the rent reserved is of the most valuable description, there the creator of the power only requires of those who shall come in succession into the possession of the estate as tenants for life, that they shall, for the

preservation of the estate, in the most beneficial form and extent, for those who shall be from time to time interested as reversioners, insert a provision, that, if the valuable rent reserved on leases for years absolute, shall not be paid for 28 days, then there shall be a right to enter at the expiration of these 28 days.

In the case of the render of 2*l.* a year, and a couple of fat capons, or 18*d.*, at the option of the lessor, it is insisted, that the power of re-entry should be altogether absolute and unconditional ; and that, at the first moment when the day has expired on which the money is demandable, the power of re-entry is to attach and enable the reversioner at that moment to turn the person out, who, upon a valuable lease for years determinable upon lives, should have permitted the day to expire before he had paid his sum of two pounds. I admit, that, if the maker of the settlement had in express terms said, "the power shall be to re-enter the moment at which the rent is due, and not paid or tendered," a court of law could not alter, but must execute such power so expressed. We must see whether the power has been complied with or not.

*Now the terms of the condition in the settlement are, that there shall *509] be contained in the leases a power of re-entry on non-payment of the rent. Is there not in the lease granted to the defendant, a power of re-entry on non-payment of the rent ? There is ; but, it has been urged with great force, that it is not such a compliance with the power as the reversioner had a right to expect the lessor should have made ; for he has clogged the clause of re-entry with a delay of fifteen days, and with the necessity of seeing that there is no sufficient distress upon the premises. The answer to this appears to me to be, that, according to our experience, such an event is so improbable, that it probably did not occur to the maker of the power to guard against it ; and not having in express terms required any particular form or terms of the clause for re-entry. I think the power is satisfied by that which has been inserted in the lease in question, and, consequently, that the lease is not invalid.

BURROUGH, J. Since the judgment was given in the Court of Exchequer Chamber, I have paid the closest attention to the subject. I have, over and over again, weighed in my mind the various facts and circumstances contained in the special verdict, and I have earnestly endeavoured to discover whether I had formed an erroneous opinion when I concurred in that judgment.

After the fullest deliberation, I am of opinion that the demise of the 5th September, 1803, is invalid ; that it was valid only during the life of the lessor, and that his death determined the estate of the lessee.

The statute of the 4 Geo. 2, c. 28, was relied on in the Exchequer Chamber, and in argument before your lordships, as bearing on the subject. In my view of this case, it has no application to the subject before the house. That statute, *510] as I conceive, applies only to *leases which, before the statute, might and must have been avoided by entry ; to cases where the cause of avoidance might have been waived. Such leases were valid till a strict legal entry was made, and before such entry they were capable of confirmation by suitable acts done by him in whom the right of re-entry was. But a lease by a tenant for life having a special power to demise, if not made conformable to the power, is the lease of a mere tenant for life, and has validity only during his life, and not a moment longer.

I cannot see that any well-grounded argument from a provision made by an act of parliament, in the case of demises of a description wholly different from the demise in question, can be urged in support of that demise. In forming our judgments on the questions submitted to us by your lordships, we must consider that we are required to give our opinion on the construction of a deed. There are certain rules of the common law which must govern us on such an occasion. One rule is, that the construction must be made on the whole deed. The principle of the common law is, *Ex antecedentibus et consequentibus est*

optima interpretatio. (a) There is another rule which also strongly applies to the case in question, and that is, *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.* Acting on these rules, I contend that there is no ambiguity in the words of the power, and that it is manifest, from various parts of the deed of the 2d July, 1757, that it was the intention of the parties to have these words understood as they are written, and without addition.

The clause of re-entry in the demise ought, I contend, to have corresponded with the *reddendum*, which *is to this effect, "yielding and paying the yearly rent of 2*l.* at Michaelmas and Lady-day, by equal portions;" [*511 and, not so corresponding, I am of opinion the lease is invalid. First, because there can be no re-entry unless this rent is behind and unpaid for 15 days from Michaelmas and Lady-day, which is an extension of the time beyond that in the *reddendum*. Secondly, because the re-entry for the non-payment of the rent cannot, by the express terms of the demise, be made, if there is sufficient distress to be had on the premises. The general scope of the deed is too well known to require repetition. It has, heretofore, been considered, that there are three distinct powers in this deed. I conceive that, correctly speaking, there is only one power consisting of three distinct parts. I say this, because the enabling words "that it shall and may be lawful, &c." are placed at the head of the whole, and are not afterwards repeated; and the other parts are introduced by the words "and also." It appears to me, from this mode of looking at the deed, that it may be fairly collected, that the framers of it must have had their minds directed to the different *parts* of the power, and must have designedly and deliberately introduced an additional restriction on that part of the power, which relates to leases for years and references in other parts to extrinsic matters, and designedly and deliberately omitted any such additional restriction in the part of the power in question, and also all words of reference to extrinsic matter or former leases.

The first part of the power is that which relates immediately to the demise in question; by this Mr. Vernon and his wife (who by the deed took successive estates for life) are enabled to grant leases for life or years, determinable on the death of a life or lives, of such lands as, at the time of the deed, were leased for life or years determinable on the dropping of a life or lives; so as the *ancient and accustomed yearly rents, dues, and services, or more [*512 or as great and beneficial rents, &c., be reserved or made payable, and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved. Now, what is the rent thereby to be reserved, but the *reddendum*?—the power of re-entry is to be for the non-payment of that rent. If that rent was not paid at Michaelmas-day or Lady-day, I contend, that it is plain, by the very terms of the deed, that the right of re-entry ought to be complete.

It is not to be doubted that former leases were admissible in evidence for two purposes: first, to show what lands were, at the time of the demise, leased for life or years, as described in the deed; secondly, to show what the ancient and accustomed rents were; for, former leases are, for these purposes, necessarily referred to. But, it appears to me to be free from doubt that, as to the power of re-entry prescribed by the deed, there is no reference to former leases or to prior circumstances, but to the *reddendum* only, ascertaining not only the rent itself, but, also, the mode and time of payment. This power of re-entry prescribed by the deed is framed in plain terms; it contains a clear proposition in itself, and, therefore, I contend, that the maxim that *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* is precisely applicable to the point. Thus to decide, is to avoid the vicious mode of interpretation,

(a) Shep. Touch, c. 5, rule 4, fo. 87.

which is reprobated, by a maxim to be found in Lord Bacon's tracts, 67. *Divinatio, non interpretatio est quæ omnino recedit a literâ.* If you stir beyond what the deed expressly prescribes, then commences the *divinatio*, and the *interpretatio* is at an end.

Next follows in the deed what, I say, is more properly a second part of the same power, than a distinct and "separate power." The general enabling words being at the beginning of the whole, this part is connected with the former part by the words "and also." "And also, by indenture, to demise any of the lands in the settlement, for any term not exceeding 21 years in possession, so as there be reserved as much or as great and beneficial yearly and other rents as were then yielded, or the best and most improved yearly rent or rents as can be reasonably had or obtained, and so as in every such lease for an absolute term of years,—(thus distinguishing them from the former leases)—there be contained a clause of re-entry, in case the rent or rents thereupon to be reserved be behind or unpaid for the space of 28 days after the time thereby respectively appointed for payment thereof." This part of the power, which is, as it were, uttered in the same breath with the former part, under the same enabling words, and united to them by the words "and also," affords very important observations. First, the rents to be reserved in these leases, are to be as much or as great and beneficial as were then yielded; here, then, is a plain reference to the then existing state of rents. To prove this, the former leases were good evidence. Or, secondly, the rents are to be the best and most improved that can be reasonably gotten: this admits, too, of reference to extrinsic matters. The 3d observation is as to the clause of re-entry prescribed by this part of the power, in case the rent be behind or unpaid for 28 days. With great deference to the judgment of those who entertain a different opinion, I cannot refrain from expressing my strong opinion on this part of the deed. In my mind, it affords an argument of irresistible weight, that the parties to this deed intentionally omitted an extension of the time of payment in the first part of the power, under which the demise in question is contended to be valid; and that they intentionally inserted the extension of 28 days in the "second part: and I confess, I feel myself alarmed at the fate of men's deeds, if it shall be holden by your lordships that the demise in question is valid, which contains an extension of the time of payment to 15 additional days, not hinted at in the power itself, and inconsistent with the *reddendum*; and which, also, contains a provision which deprives the reversioner of his re-entry, if, on any part of the premises, there may chance to be sufficient distress. That the clause of distress imposes a difficulty on the reversioner is proved by the case of *Rees on dem. Powell v. King and Morris*, tried before Mr. Justice HEATH, in the summer of 1800, at Hereford, whose opinion was ratified by the opinion of the judges of the Court of Exchequer in the following term. It was there held, that a clause of forfeiture in a lease, in case no sufficient distress was to be found on the premises, must be pursued strictly, and every part of the premises must be searched.

The third part of the power is introduced in the same manner as the second part: this is the part which empowers the leasing mines then open, or lands wherein persons may be willing to open mines. Annexed to this there are several restrictions running in this language: "So as in every such lease there be reserved or made payable such parts of the lead, copper, ore, coal, and other produce to be gotten from the said mines, or such other yearly rent or income in respect thereof, as can be reasonably had or gotten for the same, without taking any fine, &c., and so as the lessees execute counterparts; and so as there be inserted such proper and usual covenants for the effectually working the mines, &c., and doing all proper and necessary acts as are usually inserted in leases of the like nature." It is to be observed, that, with respect to these leases, there are special restrictions peculiarly applicable to them. The parties to the deed had all

the parts of this power before them, *and have cautiously introduced restrictions applicable to each part: and, can a court of law add to these restrictions? The rents of the mines, or the parts of the produce to be reserved, are to be such as can be reasonably gotten; the covenants are to be the usual covenants for effectually working them and doing all necessary acts.

In the second and third parts, the word "reasonably" is introduced; but it is wholly omitted in the first part. Is a court of law authorized to transplant the word "reasonably" to the first part, when the parties have introduced it in the second and third parts, and omitted it in the first part? I humbly submit to your lordships, that this cannot be done, if it varies the construction of the words as the parties have penned them. We are required to state to your lordships, our respective opinions, whether, having regard to the due intent and meaning of the indenture of July, 1757, according to the legal construction of the several parts of it, and having due regard to the legal effect of the facts and circumstances found by the verdict, the demise is for any and what reasons invalid? I feel, that if I depart from the plain meaning of plain words, made (if it were possible) more plain by the context matter, that I shall be at sea without a compass. If the demise in question had contained a power of re-entry framed in words literally corresponding with the words in the settlement, I conceive it would have been good. I have heard no valid objection to such a power of re-entry, notwithstanding the most earnest attention to the subject before and since the arguments in the Exchequer Chamber, and before your lordships: I have not been able to raise in my mind a doubt of the fitness of such a clause, or of its being that which the parties intended.

For the reasons I have stated, I am of opinion, first, that the former leases were not admissible in *evidence to show that they contain clauses similar to those to be found in the demise in question, respecting the extension of the time of payment, and respecting the distress. Secondly, I am of opinion, for the reasons I have given, that the demise in question is invalid. The house has been told at the bar, that a decision, that this demise is invalid, will have the effect of destroying other leases made under similar powers. I cannot take notice of such a statement, first, because it is an assertion of a fact, of which, as a judge, in a court of law, I can have no knowledge; secondly, if it were fit that it should weigh with us, ought we not to see the settlements and the leases, in order to know that the *antecedentia et consequentia* are the same as in the case before your lordships? A variation in the words and context matter might vary the grounds of our judgments. Thirdly, if there were other leases made under circumstances precisely similar, it would not vary the opinion I have formed. I cannot accommodate my opinion to the convenience of lessees under powers; their estates must stand or fall by the authority under which they are made. It is a maxim of our law, that it is better to suffer a mischief than an inconvenience: the mischief (if it be any) we can see the extent of; it will be that certain demises, in consequence of the carelessness or ignorance of those who drew them, will be invalid, and they who were intended to take, in the event of there being no good subsisting leases, will take. On the other hand, no one can foresee the end of inconveniences which would arise from the relaxation of the rules of law in the construction of these deeds.

I have only a few words as to the cases of *Hotley v. Scot*, Lofft. 316, and *Coxe v. Day*. From the report of the first case, I cannot discover what was decided, it is to *me unintelligible; but, supposing it to be applicable, we have the later case of *Coxe v. Day*. The decision of the four learned men on the second question has great weight with me, and I cannot see why it ought not to guide our judgment on the present occasion. It is well known, that the late learned Lord Chief Justice of the Common Pleas, Sir Vicary Gibbs, thought that decision right, and was of opinion, that the present lease was in-

valid : he was in office when the present case found its way into the Exchequer Chamber.

HOLROYD, J. I think that, having due regard to the true intent and meaning of the indenture of the 2d of July, 1757, according to the legal construction of the several parts of that indenture, as stated in the special verdict, and having also due regard to the legal effects of all the facts and circumstances found by the special verdict, the demise of the 5th of September, 1803, as the same is stated in the special verdict, is invalid.

By the death of Lord Vernon, the lessor, who had an estate in him for life only, that demise became invalid, unless it were made in conformity to one of the powers of leasing contained in the above-mentioned indenture of the 2d of July, 1757. That indenture contains three powers of leasing ; one, for a life or lives, or for a term determinable on a life or lives ; another, for years not exceeding twenty-one ; and the third, for working mines or ore for years not exceeding thirty-one. Each of these powers is clogged with qualifications of two descriptions ; one class of which is comparative, or with reference either to the existing or previous state of things, or to usage or custom, or to what can reasonably be had or obtained ; the other class is direct and absolute, without any reference or regard either to the existing or previous state of things, or to usage *518] or "custom, or to what can be reasonably had or obtained, or to any matter whatever ; these last qualifications are superadded by the creatrix of the power, to be complied with at all events, as I think, without reference or regard to any matter, and not to be varied, changed, or altered by, or at all to depend upon usage, custom, or state of things, or any matter whatever.

The first of the above powers of leasing is that upon which the present question depends, the power of leasing for a life or lives, or for years determinable upon a life or lives. The qualifications, with which that power is clogged, are, as to the reservation of the rents, duties, and services, that they be such as were the ancient and accustomed, or more or as great or beneficial as at the time of the demising were payable, or as much as a just proportion thereof of amounts to, according to the value of the premises demised or more, with the exception of heriots. These qualifications are comparative, or with reference, expressly, to the things there expressed ; and must be such as, on such comparison or reference, shall be found conformable thereto, and are wholly dependent thereupon. But the other class of qualifications superadded to this power is direct and absolute, and without reference to and wholly independent, as it seems to me, upon any other matter except what the law requires, and to be complied with at all events, whatever may be or may have been any usage, custom, or state of things whatever.—These other qualifications are, that the rents, duties, and services be incident to and go along with the reversion and remainder ; that the leases contain a power of re-entry for non-payment of the rent reserved, and not contain any express clause freeing the lessees from impeachment of waste, and that the lessees seal and deliver a counterpart of the lease. It is upon one of these direct, "absolute, and independent qualifications of that power, that the present question has arisen. That qualification is in the following words : "So as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." This qualification being expressed in words that are direct and absolute, and without reference to any former leases, or to any prior or then existing state of things, or former management or disposition of the property, the fact found by the jury, with respect to the former leases, cannot, I think, vary the legal construction to be given to this qualification. There is, in the words, no latent ambiguity, which those former leases either raise or remove. If the words be not clear and explicit in themselves, their ambiguity, if any, is upon the face of the deed itself, and they cannot, I think, by law be allowed to crave in aid any former usage to vary or alter their construction : and this more especially

in the case of such a deed as the present, wherein the parties expressly direct, that a reference to the then existing or former usages should be had recourse to, where they intend that either of them should be called in aid on the subject-matter of these qualifications. Besides, it has been held by the Court of King's Bench, in *Iggulden v. May*, 7 East, 237, as well as by the lord chancellor in the same case, 9 Ves. jun. 329, ratifying similar doctrine that had before been held both by Lord ALVANLEY and Sir William GRANT, when masters of the rolls, on covenants for renewal of leases, that the construction of deeds cannot be varied by the acts of the parties; and, therefore, various other leases, that had before been successively made by the owners of the inheritance for the time being, could not be taken in aid to construe the meaning of a covenant for renewal. The instability and uncertainty introduced into rights *of property created by deed, by letting in such extrinsic evidence, and the [*520] mischief arising therefrom, would apply equally, as it seems to me, to the present case.

The present question arises in a case where the exercise of the power is by a person, (namely, Lord Vernon) who, previous to the creation of the power, was a stranger to the estate; and in a case, where this qualification of the power given to him by his wife, must be taken to have been inserted as well for the benefit of herself, as of the several other persons in remainder, in derogation of whose rights his exercise of the power would operate, so long as the lease should continue valid after the extinction of his life estate. It would operate in derogation of her and their rights, by depriving them, successively, of the actual occupation and enjoyment of the demised premises themselves, which they would otherwise be entitled to have, and giving them, successively, in lieu thereof, a rent or rents such as the power required, however inadequate the same might be.

The power given to the tenant for life to a lease for a term that may last beyond his own life, is, agreeable to what is said by Lord ELLENBOROUGH in *Coxe v. Day*, 13 East, 127, for the benefit of the tenant for life; the qualifications only, as he there, also says, are for the benefit of those in remainder: and, in this case, those in remainder, who are to be protected by these qualifications (except the creatrix of the power herself,) are not parties or privies, but are strangers to the deed; and, therefore, as to them, the words of the deed are to have their full operation for their protection against the tenant for life, who executed the power, and against whose act, which would or might be to their detriment, they were to be protected by this qualification. The very intent of prescribing these requisites is to protect the several *remainder-men from [*521] the discretion of the tenant for life in the exercise of this power of leasing given to him. The object of the qualification is to secure to them the rent itself, and not to give them any substitute whatever in lieu thereof, other than and except the land itself, for which the rent was to be paid. For this purpose, this qualification looks to and specifies some occasion or event, and that, a simple unqualified one, namely, the non-payment of rent, not under any particular circumstances only, but generally, whenever there is a non-payment of rent: that is to say, it looks to and specifies the default of the lessees by the non-payment of the rent as the occasion or event, on which those entitled to the rent to be paid for the land, shall, for want of the rent, have the land itself, the *quid pro quo* the rent was to be paid. Whenever that event or default arises, the case then exists, I think, on which the land was to be had for that default, without any other matter being to be superadded thereupon, except what the general rules of law, independently of particular terms of contract, would require, such as those requiring in a particular manner and form, a demand of the rent due.

The words applying to the power of re-entry required to be contained in the lease, are "a power of re-entry for non-payment of the rent thereby to be reserved;" that is, as I think, such a power as will authorize the party, when-

ever there is a non-payment of the reserved rent, to re-enter. That is the express cause, on account of which he is to be at liberty to re-enter, which liberty must, I think, be co-extensive and co-existent with that cause; and that cause which is non-payment of rent, (such, I mean, as will authorize a re-entry) exists from the very instant that there is such a default of payment as the law requires to authorize a re-entry: and that default of payment equally exists from the moment of such a demand as the law requires being made of the rent

*522] *due and non-payment thereon, without any subsequent definite period of time having elapsed; and whether there be or be not distrainable goods on the premises sufficient to pay the arrears of the rent, and by the sale of which the remainder-man may, at his own trouble and risk, pay himself those arrears. The words "for non-payment," must in this case, I think, be taken to mean the same as either, "because of"—"by reason of"—"on account of," or "in case of non-payment;" that is to say, when that event occurs, and the same, therefore, as if the words were *on* non-payment of rent. That appears to me to be the proper sense and meaning of the words; and it is also, as I think, agreeable to the object of the qualification, which is, that the party shall have the land, whenever the lessee fails to pay the rent for it. The lessee's failure or default in the performance of a duty, which it is incumbent on him to perform, is the sole ground and consideration for entitling the party to re-enter and have again the land without regard to any possibility or power, which the rent-owner may have to obtain the rent by any other means or exertions of his own.

But it has been argued, that this qualification, in requiring a power of re-entry, is silent as to the time when it should be carried into effect; and, therefore, that it may be considered to require only, that there should be some reasonable power of re-entry for non-payment of the rent, and that the power of re-entry reserved upon the lease in question, is a reasonable power of re-entry for non-payment of the rent, and, therefore, as much as the creatrix of the power has required. To this, besides observing that the word "reasonable" is not here used in the deed, though it is used in two other instances in giving those powers where a discretion was intended to be given, I answer, that this qualification, in *523] my opinion, is not to be so "considered, if, upon the due and proper construction of this leasing power, this leasing power, if fully executed, would have authorized a re-entry for non-payment of rent in any case, in which such entry would not be authorized for non-payment of rent upon the lease in question. And I say, that there are cases, in which, if the power of leasing had been fully executed, a re-entry might lawfully be made for the non-payment of rent, in which it could not lawfully be made under this lease.

To try whether this be so or not, suppose the right of re-entry reserved by this lease, instead of its being in its present form, had used the very words of qualification used in the deed creating the power of leasing. Suppose the lease had been, "Provided that it shall be lawful for the lessors, &c., to re-enter," (or, "that they shall have power of re-entry,") "for non-payment of the rent hereby reserved." That is an easy and obvious way of framing the proviso, and most likely to be adopted, as I should think, by a person having recourse to, and looking at the leasing power, as he ought to do, who is anxious to be secure; and that clearly, I think, would have been a due execution of the power, and under such an execution of the power, by using those words in the lease, whenever there was a default of payment whether fifteen days had elapsed or not since the rent became due, or whether a sufficient distress was on the demised premises or not, the right of re-entry would have arisen in case the landlord had made such a demand of the rent as the law for that purpose requires: so that the same construction would be given to those words, where used in the lease, as if the words had been *on* non-payment of rent; whereas, according to the right of re-entry actually reserved, the

landlord has no such right of re-entry (though the rent is due, and has been so demanded,) for fifteen days, during which he would have such a right, under such a due execution of the power of leasing as I have above supposed, nor *would he have such right of re-entry at any period of time when there [524
was a sufficient distress on the premises, on which he might levy for his rent, though upon the goods of innocent third persons; which right of re-entry he would have during all that period in the other case, and without the painful necessity of being driven, in any case, to his remedy by distress upon the goods of innocent strangers. So that he has not that right and specific remedy in lieu of his rent in those cases, under the lease in question, which he would have had under it on such a due execution of the leasing power, as I have above supposed; but a different one, and such, as in some of such cases at least, some conscientious persons would not resort to or enforce, such as enforcing the power of distress upon the goods of innocent third persons. The construction of the words in question, therefore, if used in a lease instead of being used in the leasing power, taken according to the proper and ordinary sense and meaning of the words used, would, as it appears to me, have given a right of re-entry immediately on non-payment of the rent. They cannot, therefore, I think, be properly deemed to have a different import and signification, when used in the leasing power, from what they would have in a lease made in conformity to that power, or that they would have, if they were used in any lease whatever. There is not only no right of re-entry given for non-payment of the rent, until a default of payment for fifteen days; but even on such default, the right given by the proviso is not a right of re-entry to possess or enjoy the land, but a right only of distress in case there be a sufficient distress upon the premises. In the forms of leases contained in Horseman's Conveyancing, in the edition that I have, I have been able to find only one that is clogged with the insufficiency of distress: all the others appear to be without it. Those leases appear to have been between the *times of the statutes of William and Mary, and Geo. [525
2, and several of the conveyances there for securing annuities give, first,
a power of distress, in case the annuity be in arrear for a given number of days, and a right of re-entry and enjoyment, till satisfaction, in case it be in arrear for a larger number of days, without regard to whether there be or be not any sufficient distress upon the premises. I think, too, that it affords an argument in favour of the above construction, and that nothing else can legally be deemed to have been in the contemplation or intention of the creatrix of the leasing power, when she used the words in question, than a mere simple non-payment or default of payment of rent *generally*, unaccompanied with any other fact or circumstance, except that which the general rule of law requires, viz. a demand. It is manifest that, where she meant any other fact or circumstance should accompany that non-payment before the right of re-entry should be given, she has expressly mentioned it; for in the second leasing power, she enables leases to be granted, though the right of re-entry be not reserved except upon a lapse of non-payment for 28 days, after the time appointed for payment of the rent. And I do not see how the lease in question can be held to be valid, except upon principles of law that would have rendered it also valid, in case the creatrix of the leasing powers had, also, expressly added in the second leasing power, another ingredient besides that lapse of 28 days, namely, the want of a sufficient distress upon the premises, without both which, in addition to the mere non-payment of rent, a right of re-entry need not, in that case, have been reserved under the second leasing power.

But, in truth, the reserved right of re-entry which is now in question (whether it is to be deemed reasonable or unreasonable) is not a right of re-entry for *non-payment of rent; but it is, in truth a right of re-entry for a different thing, which may never exist, notwithstanding there is a default [526
of payment of rent, namely, for an aggregate, consisting in part, indeed, of that

default, but of two other things besides, namely, a certain lapse of time, and a want of sufficient distress. It is, in reality, not a right of re-entry for non-payment of rent, but a right of re-entry for want of a sufficient distress in case of such non-payment. Instead of giving a right of re-entry for non-payment of rent, it refers the remainder-man to the right of distress on that event, a right which he would have by the general law, even without such reference; and it gives him the right of re-entry only at a later time, for a different thing, and on a further event, viz. the want of sufficient distress.

It is not, therefore, in reality a right of re-entry for the same thing as the creatrix of the leasing power required it should be for, (and which right, as I have said before, must, I think, be co-extensive with the existence of the thing, or event, or default, for which it was given;) but it is a right of re-entry for a combination of things, all of which must exist, before the right of re-entry can be exercised. And how reasonable soever it may be thought, that this qualification of this leasing power might have been given by its creatrix for the securing of the rent, instead of the qualification she has actually given to it, it cannot, I think, be substituted for the qualification, which she has actually given and required.

But it has been argued, that all this is immaterial, because of the general clause of re-entry that follows, for default of the performance of any of the reservations, covenants, &c. But it is so completely settled, both on the maxims and authorities of law, that the *general* clause of re-entry can extend ^{*527]} only to cases not before *specially provided for, more especially when it would otherwise contradict and defeat the prior express provision, that I shall say no more upon this point.

But, then, it has further been objected, that, this leasing power being given and executed since the statute 4 Geo. 2, c. 28, s. 2, the insertion of the want of a sufficient distress on the demised premises in the leases, in order to give the right of re-entry, has become immaterial; because it has been urged, that, since that statute, no right of re-entry for non-payment of rent can be rendered effectual, so as to regain the actual possession, unless where there is no sufficient distress to be found on the demised premises countervailing the arrears of rent due. But that statute does not appear to make any difference in the present case. That statute applies only to cases where the landlord has omitted to make such a demand of the rent as would entitle him to the forfeiture, and substitutes for his relief other things to be done in lieu, and then gives him the benefit of a forfeiture, (to which he would not be otherwise entitled,) and gives him that benefit only in certain cases, amongst which is the want of a sufficient distress, and on certain terms. But, notwithstanding that statute, where a due demand of the rent has been made, a right of re-entry may be given, and may be effectually enforced, though a sufficient distress be upon the demised premises. That statute, too, applies only to cases where a half year's rent is in arrear, and not to cases where a less arrear of rent is due, as may be on the lease in question by a part payment, although the rent is reserved not quarterly but half yearly.

But it has been further urged, that not only the above statute of the 4th Geo. 2d, but also the cases both at *law and in equity show, that the object ^{*528]} of a power of re-entry is only to secure the payment of the rent. It was then contended, that this payment of the rent is as effectually, and as beneficially secured by the power of re-entry actually reserved in the present case, as if that power had been reserved in the words used in the leasing power; inasmuch as it is said, that it reserves the right of re-entry in all cases where the landlord cannot himself by a distress obtain the payment of the rent. This, it was argued, appears by the necessity there is (even after entry) of obtaining judgment and execution in an action of ejectment, before possession can be obtained; and by the relief, which the courts, both of law and

equity, but more particularly the latter, give, independently of the provisions of that statute, in cases of forfeiture for non-payment of rent. But let us see how the case as to this point stands. If the right of re-entry reserved had been merely for non-payment of the rent, in the terms of the right of re-entry required by the leasing power, it is clear, I take it, that, on a due demand of the rent being made, (and by the statute 4th Geo. 2d, even without such demand, where half a year's rent remains due,) the landlord would have been entitled either to have the rent itself actually paid to him, or to have the land. No other act in that case need be done, or any trouble or risk undergone by him with regard to the rent; but, without further act, trouble, or risk on his part, he might immediately enter into the land, or immediately proceed to recover the possession thereof by an action of ejectment, against which the tenant could not gain relief, without his paying the rent itself with costs: and, unless he thus gets such relief, the landlord would be entitled to recover all the mesne profits from the time of the default, by the non-payment of rent. The right of re-entry actually reserved in the present case, gives him no power to *re-enter or to proceed by ejectment, until the expiration of 15 days, nor [*529] at any period of time, until there is the want of a sufficient distress upon the premises, nor any right to recover the mesne profits further back, than not only the expiration of the 15 days, but also the time when there can be proved to be, or when there was such want of distress: and, so long as there continues such a distress, the only remedy the landlord has for the rent is by action for it, or by distress; so that, instead of having the rent by the payment and act of the lessee himself, or, in default thereof, an immediate right to enter or recover possession of the land itself, the remainder-man is driven to the necessity of incurring not only the trouble and expense of ascertaining—whether there is or is not a sufficient legal distress upon the premises,—whether of the property of the tenant or of third persons,—of waiting, where the distress is of standing corn, until it is ripe and cut, (for till then it cannot be appraised or sold for payment of the rent,)—but, also, of incurring the trouble, delay, and risk attending the making the distress, in such manner as is in no respect illegal, either by reason of the manner of making or disposing thereof, or by reason of the distrained property being privileged from distress by the same being in the way to market, or by reason of trade or otherwise. Not only is the remainder-man driven to this trouble, but the tenant may also deprive him of the power of sale by a replevy of the distress; and, it may happen at the end of the replevin suit, that by the eloignment of the distrained property, the insufficiency of the pledges in replevin, and the insolvency, or death without sufficient assets unadministered of the sheriff and the tenant, his remedy by distress may finally fail, with the additional loss and costs both of the distress and of the replevin suit; and, if this does not happen, he may still be without his rent, unless *he take upon himself the trouble and [*530] expense of prosecuting execution *pro retorno habendo*, or for his debts and costs, and the trouble and risk of prosecuting some further action or actions against the sheriff or the bail in replevin, in case such execution shall prove ineffectual; and his remedy by ejectment would be, in that case, delayed until these results of the replevin suit shall have been ascertained, even if an action of ejectment would then lie for the non-payment of that rent which had been before distrained for. So that, after the termination of the distress and replevin suit, it may happen, that the remainder-man may lose his rent with addition of costs. The payment of the rent is not, therefore, I think, as effectually and beneficially secured by the right of re-entry actually reserved, as if that right had been reserved in the words of, or according to the leasing power.

I have considered the question, as above, independently of the disputed authorities of *Coxe v. Day*, 13 East, 118, and *Doe dem. Vaughan v. Meyler*, 2 M. & S. 276, both which cases, I think, were rightly decided notwithstanding

the prior case of *Hotley v. Scot.* I have considered the question, too, as if, in the lease, the rent reserved had been a money-rent only, because it has been so treated in the arguments here, and in the courts below. But it is to be observed that this is the case, not of a lease for a money-rent only, but, also, for a rent of another nature, although certainly a very small one, namely, the additional rent of a couple of fat capons or money at the election, not of the tenant, but of the lessor or remainder-man, who would, therefore, be entitled, if he pleased, to have that rent in kind, instead of money. It has been considered on all sides as the case of a lease for a money-rent only; I presume, on this ground, that *531] the "special right of re-entry, depending on the want of a sufficient distress" does not apply to this additional rent or reservation, but to the money-rent only, and that the right of re-entry applicable to this additional rent is the general right of re-entry subsequently given by the lease in case of default in payment or performance of any of the reservations, covenants, &c.: and this may be the case if the statute 2 W. & M. c. 5, which is the statute giving the power of sale of a distress for rent, be deemed to be confined to money-rents only. But, if the default of payment of this additional rent be within the special rights of re-entry depending on the want of a sufficient distress, more especially, if this kind of rent be also not within the above statute of William & Mary, so that the distress could not be sold under that statute for the purpose of raising or paying that rent, though, if it could be so sold for that purpose, it would not raise the rent in kind agreeable to the landlord's right of election but in money only, at least not without additional trouble and expense to the landlord of purchasing the rent in kind with the money raised by the sale, that is, either by doing it himself or procuring another to do it, I say that, in such case, the question proposed to us by your lordships, as it appears to me, would embrace still further considerations arising from those circumstances, as the distress for that small rent in kind, viz. the two capons, would, in that case, that is to say, if it could not be sold under the statute, remain only a dry unprofitable chargeable pledge for that rent, in lieu of the productive security and enjoyment of the land. This, however, it is unnecessary for me to consider, inasmuch as, whether the additional rent in kind would embrace further considerations as to the law of the case or not, I think, for the reasons which I have *532] before stated, that, having due regard to every thing alluded to in the question proposed to us by your lordships, the lease in question is invalid.

PARK, J. I shall answer the question proposed to the judges, very shortly; because I have so fully given my opinion upon it in another place, a full and accurate report of which, in two different books, is in the hands of some of your lordships. And meaning, in what I am to trouble the house with, to adhere to the opinion I formerly delivered, I, of course, in answer to your lordships' question must state, that, having a due regard to the true intent and meaning of the indenture of the 2d of July, 1757, according to the legal construction of the several parts of that indenture, as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th Sept. 1803, is, in my opinion, invalid.

I proceed to state to your lordships, as the question requires, my reasons for so thinking. But, before I do so, I beg your lordships to believe me, when I positively disclaim the notion, that I thus give my opinion to preserve my own consistency. I have often heard eminent judges so declare; but, surely, consistency in error is no credit to the man or the judge. For one, I should never be ashamed, (and I have lately acted upon that feeling) where my understanding is convinced that I had upon some former occasion formed an erroneous judgment, manfully and fearlessly to acknowledge it, and, as speedily as possible, to retrace my steps.

The objections to this lease are two: viz. that it does not pursue the power,

inasmuch as a clause is required to be in every lease in these words: "So as there be contained in every such lease *a* power of re-entry for *non-payment of the rent thereby to be reserved," and nothing more: whereas, [^{*533} it is said, this lease contains a power of re-entry, not *generally*, but clogged with two conditions,—"Provided the rent, &c., shall be behind and unpaid, &c. for 15 days, and no sufficient distress can or may be had or taken upon the premises." And these two objections fall under very different considerations; but, it must be admitted, that, if either of them prevail, the lease is invalid. As to the general rules which govern the courts in the construction of leasing powers, they are all now well understood, and have been so fully explained and commented upon by some of my learned brothers, who have preceded me, that it would be a silly parade of learning, and a useless waste of the time of the house, to enter upon them: it being sufficient to state, that the intention of the parties, which is to be collected from the instrument, is to be the governing principle in the construction.

The words of the power having been read to your lordships. "So as there be contained *a* power of re-entry for non-payment of the rent thereby to be reserved," it has been asked, "if a plain man were asked how he would execute such a power, what would he say?" I answer distinctly, that he would say, "insert a clause in the very words of the power, that the lessor shall have a power to re-enter for non-payment of the rent thereby reserved." I answer, that such a plain man, in my conception, would be grievously surprised to find two conditions, which he will in vain look for in the power; but which materially alter the rights of the remainder-man. The power to make leases is to be construed so as to lean neither to the one party nor the other; for the maker of the power certainly intended, that they should operate for the benefit of both: of the one by giving him the enjoyment, during his life, ^{*of an estate} well cultivated; of the other (*viz.* the remainder-man) by preventing [^{*534} him from coming to an impoverished one.

It seems to me, that, to contend for what is insisted on by the plaintiff in error, is to say, that "absolute" and "conditional mean the same thing: or, that a power clogged with two conditions, is the same thing as an unclogged and unconditional power. When this case was before the Exchequer Chamber, I stated that, if the only objection to this lease were the time given, before the lapse of which he could not re-enter for non-payment of the rent as then advised, I should think the objection fatal. I have heard nothing since to remove my doubt. It is said, indeed, that, the indefinite article *a* being used, namely, *a* power, *any* power that is reasonable may be inserted. But what right have we to do this for the grantor of the power? Who has a right to insert this word? Who, if inserted, is to construe it? The court or the jury? If 15 days be reasonable, why not 20, 25, and 30? That this was never contemplated, I think, quite clear; for, whenever time is meant to be given, it is expressed, and, therefore, she must be presumed to have known, that, where she meant to give time, it ought to be expressed, lest the giving it in one case should be construed, as it is by me, that it was not intended to be given in the other. But I have said, and I repeat it, what right have we to insert the word "reasonable" into this power? If this word "reasonable" never found its way into powers, it might perhaps more fairly be argued that it was inherent in all. But, looking at precedents and adjudged cases, we do find the words "usual" and "reasonable" sometimes jointly introduced, sometimes separately; and these words, when introduced, compel the courts to consider what are usual,—what are reasonable covenants—under such powers. If, then, it is not unusual to insert such words, ^{*why} are the courts to introduce them, where the creator [^{*535} of the power has not; and who, by omitting them, must be taken to have intended that they should not be inserted? But I am staggered by what is said in a book of great authority, and to which I think the professional public are

much indebted, (a) that, if this objection were to prevail, it would invalidate nine-tenths of all the leases in the kingdom granted under powers. I can only say, such a consequence is to be deeply deplored; but it is entirely owing to this, that those who have prepared such leases have chosen to follow their own new fangled conceits, instead of using the exact words of the power conferring the right to lease upon certain terms, and upon certain terms only. This argument, that many leases will be invalidated, may be a very good one to your lordships in your legislative capacity, on account of the hardship of the case; but cannot, and ought not to influence you when your province is *jus dicere, non dare*. However, if this were the only objection to the lease in question, on account of the long practice which has prevailed, as it is alleged, I might be inclined to pause before I presumed to offer my humble advice to your lordships, that, on this ground alone, the lease would be void.

But the second objection seems to me to be impossible to be got over. I have thought much about it, both before I gave my judgment in the Exchequer Chamber, and since. I have turned it in every point of view, I have heard all that learning and ability at the bar could suggest, I have, of course, been present at all the conferences with my learned brethren, I have been most desirous to be convinced, if my opinion be erroneous; but, after all, I cannot raise in my ^{*536]} mind a probable doubt; and, though, if the decision of your *lordships should be ultimately in favour of the lease, it will be my duty to conform to that opinion, I am, at present, bound to state my entire concurrence in this point with my learned brothers, RICHARDSON, BURROUGH, and HOLROYD, who have preceded me. Their luminous exposition of the argument, and my own judgment in the Exchequer Chamber, which is very accurately reported, both by Messrs. Broderip and Bingham, and by Mr. Moore, and which is in the possession of some of your lordships, render it unnecessary for me to do more, on this head, than to make an observation or two on the cases that have been quoted.

The main reliance on the other side is on the case of *Hotley v. Scot, Loftt.* 216. Of that reporter I shall say no more than this, (without forming any judgment of my own) that, during a long professional life of 40 years, and Loftt's Reports embracing a period of that great man's life who then presided in the Court of King's Bench, during which, as to this part of them, there is no other reporter; (for the reports of the very learned person now at your lordships' table, (b) did not commence till 1774, nearly two years after Mr. Loftt's,) I never heard them quoted three times in my life. But, without any observations of this kind, it is quite clear from that report, that none of the learned counsel then at the bar, neither Mr. Dunning nor Mr. Bearcroft, neither my Lord MANSFIELD nor any of the judges appear to have taken the least notice of the condition as to the want of a sufficient distress, which is the very point now under consideration, and which, from the terms of the power and lease in that case might have arisen. But, it is said, there is a note of that case by Mr. Butler, taken by himself, in which it appears to have been mentioned; I ^{*537]} have not seen that note, and, therefore, I can say *nothing to it. I entertain great respect for that gentleman, and I do not wish to depreciate the labours of the young; but, unless he be much more advanced in life than, for the sake of the public I wish him to be, he must, forty-eight years ago, have been a very young man. But, admitting the point to have been mentioned, it cannot have formed a prominent feature, either in the argument at the bar, or in the consideration of the court: for, if it had, it is impossible that Mr. Loftt, or any other man, in a report of four pages should have omitted it. Can such a case, for a moment, be put in competition with *Coxe v. Day*, 13 East, 118, where this clause was the main objection to the lease, a case

(a) Sugden on Powers.

(b) Henry Cowper, Esq.

most ably argued at the bar by the now chief justice of that court, and receiving the deliberate certificate of four very eminent judges, Lord ELLENBOROUGH, Justices GROSE, LE BLANC, and BAYLEY? In the course of that argument Lord ELLENBOROUGH said, "There can be no doubt, that it is more beneficial to the owner of the estate to have a power of re-entry *at once* upon the tenant upon non-payment of the rent, within a certain time, than to have such a power only *in case* there shall be no sufficient distress upon the premises." And, in another place, when Mr. Abbott was strongly pressing on the court, that such a clause secured the landlord's object, namely, satisfying his rent more speedily than in any other way, Lord ELLENBOROUGH said, in answer, "In the one case it is to be secured from time-to-time by successive suits with the risk of sureties if the distress be replevied; in the other, it is secured, once for all, by the landlord's re-possessing himself of the land out of which the rent is derived." Can any one say, my lords, that the one remedy is not more easy, more direct, and less circuitous than the other?—and that great man (Lord ELLENBOROUGH) again *says, "Surely the direct power is more beneficial to the landlord." [538] And the certificate of all the learned judges is in direct conformity with these *dicta* of Lord ELLENBOROUGH; for it is said, "We are of opinion, that the power of re-entry reserved in and by the said lease for non-payment of the rent is not made in conformity to the power in the settlement for granting leases of the freehold part of the said premises, and that the lease is void on that ground." Not having seen any report of the judgment of the Court of King's Bench upon this case of *Doe dem. Earl Jersey v. Smith*, I cannot tell whether this case of *Coxe v. Day*, was recalled to their attention; but I am quite sure it is impossible to reconcile the one with the other. This was so strongly felt by two very learned judges in the court below, that, at once, they doubted the propriety of that decision; and one of them says, "it is not law, for it is diametrically opposite to reason and common sense."(a) I am sorry to say I think directly the contrary; but I, for one, seriously object to this mode of getting rid of decisions, because they militate against our own notions. I agree with the pointed manner in which this was expressed lately in this house by the lord chief justice of the Court of Common Pleas; and I hope I shall be excused for using his language. "If the law so settled is now to be considered unsettled, I know not on what foundation, in point of law, any decision can stand.(b)

But the case of *Coxe v. Day* is not a solitary case; for the question again, in about three years after, came under the consideration of three of the same judges who decided *Coxe v. Day*, namely, Lord ELLENBOROUGH, Judges LE BLANC and BAYLEY, with the addition of another learned person now no more (Mr. Justice DAMPIER,) and who could not have decided as they did without determining, that such a clause as we are now considering rendered a [539] lease void where the power did not authorize it. The case I allude to is *Doe dem. Vaughan v. Meyler*, 2 M. & S. 276. The case was tried before the latter judge at Hereford, who thought the objection, such as we have here, was one that went to the whole lease, though it was partly of lands of which the lessor was seised in fee, and of lands in which he had only an estate for life with a leasing power, provided there was a clause of re-entry for non-payment of rent for 15 days. The lease was not executed according to this power; for it added, "and if there be no sufficient distress;" but the court held, though the lease was void, because not executed according to the power, yet it was good as to the land of which the lessor was seised in fee, and the court apportioned the rent: which was an erroneous judgment, if the objection to the present lease be not a good one.

The case of *Rees, on the demise of Powell, v. King, Forrest*, 19, I formerly

(a) Vide ante, vol. i. 195.

(b) Vide ante, *Rowe v. Young*, 273.

thought, and still think, sets this point at rest, by showing that such a clause as this throws a burden upon the right of re-entry which the maker of the power never contemplated. That case has been so often mentioned, that it is enough to say of it, that it has decided, that before a plaintiff in ejectment can recover upon a clause of re-entry in a lease, in case there be no sufficient distress on the premises, he must show, that every part of the premises has been searched, else he cannot say there was no sufficient distress. The judge who first decided this was well known to some of your lordships, and no man will decry the knowledge of the late Mr. Justice HEATH; and his opinion was confirmed by the Court of Exchequer. If the Courts of Westminster Hall were to overturn that decision, it would go a great way to shake my present opinion;
*540] but I do not learn, that any of my brethren are prepared to do so; and if, therefore, I feel myself bound, as I shall feel, to call upon any plaintiff in ejectment on the circuit, who has such a clog on his clause of re-entry as this, to prove that he has made a full search for a distress before I permit such a plaintiff to recover, I cannot conscientiously advise your lordships, that this lease is valid; most sincerely, however, wishing that, consistently with my honest opinion, I could do so.

Of one other point I must take notice, namely, that, as this lease contains a general clause of re-entry, it must, necessarily control the special clause. To that position, I, for one, at present, cannot agree; for I find the contrary doctrine maintained from *Altham's case*, 8 Co. 154 b, down to the present day. In *Altham's case* we find this position or rather this maxim adopted. In the first part of the argument, putting every point that can possibly occur, his lordship says, “*Quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quae clausulae generales sunt consentanea, interpretanda est carta secundum verba specialia.*” But he goes on to add, there is another rule or principle of law, viz. “*generalis clausula non porrigitur ad ea, quae ante specialiter sunt comprehensa.*” Therefore, I say, this point, for which I am now arguing, being first specially defined, cannot be enlarged by a subsequent general clause, which can only apply to cases not before specified or defined. So in Sheppard's Touchstone (which is supposed to be the work of no less a man than Mr. Justice DODDRIDGE,) on the exposition of deeds, ch. 5, p. 88, fo. 7, in confirmation of the above doctrine that writer says, “If there be two clauses or parts of the deed repugnant to one another, the first part shall be received, and the latter rejected, unless *there be some special reason to the contrary.” If we descend to more modern times, we find the same rule universally adopted and confirmed by judges on particular cases depending before them. In *Cother v. Merrick*, Hardr. 89, Mr. Baron NICHOLAS, quoting the Year-Books in support of his opinion, says, Hardr. 94, “When there are two clauses in a deed of which the latter is contradictory to the former, there the former shall stand.” And, not to multiply authorities upon a point on which Lord ELLENBOROUGH intimated a strong opinion, when he expressed himself against the validity of an argument founded upon such a point, I shall only quote one more from what Lord Chief Justice HOLT and two of his brethren said in *Thomas v. Howell*, 4 Mod. 69, that, “in deeds it was admitted, that subsequent clauses which are general, shall be governed by precedent clauses which are more particular.” I therefore, think, that this ground does not, in any way, strengthen the argument as to the validity of the lease.
*541]

The point upon the statute of 4 Geo. 2. has been so ably handled, and so luminously explained by my learned brother HOLROYD, who has just addressed the house, that I shall not trouble your lordships on that point, but to say, I entirely concur with him.

The next point is, whether the other leases should be admitted as evidence? And, upon that point, I shall trouble the house very shortly. I am willing to admit that, if this deed upon the clause in question contains any latent ambiguity

raised by extrinsic evidence, parol evidence or extrinsic evidence may be admitted to explain it, or to render it unambiguous. But I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to contradict, vary, or add to the terms of a deed. It would be of "most" [*542 dangerous consequence to admit such testimony; for, then, parties dealing in matters on writing made upon advice and consideration, would be subjected either to the uncertain testimony of vague and precarious memory; or, as in the case at bar, to matter, of which at the time of contracting, they might have no knowledge, and never intended to be under its control. The written instrument, therefore, unless in cases of fraud, or other excepted cases, with which I need not trouble your lordships, and of which I insist this is not one, must be considered as speaking the sense of the parties to that deed or instrument. Upon this ground it was, I conceive, that the case of *Cooke v. Booth*, Cwp. 819, met with such a decided opinion against it in *Baynham v. Guy's Hospital*, 3 Ves. jun. 298, by Lord ALVANLEY when master of the rolls, who, not only states his own opinion, but that of the late Mr. Justice WILSON, who had argued the case of *Cooke v. Booth*, who, Lord ALVANLEY says, was astonished at the decision as well as at that of Lord THURLOW. The master of the rolls says, "I protest against the argument of the learned judges as to construing a legal instrument by the equivocal acts of the parties and their understanding upon it." The case of *Tritton v. Foote*, 2 Bro. C. C. 636, seems directly at variance with *Cooke v. Booth*. In *Iggulden v. May*, 4 N. R. 449(a) the Court of Exchequer Chamber, unanimously affirming a judgment of the Court of King's Bench, held, that a covenant in a lease to grant a new lease, with all covenants, grants, and articles, as in the said indenture is contained, does not bind the lessor to insert a covenant of renewal in the renewed lease, although it was alleged in the pleadings, that the covenant required had been introduced in various other cases before then "successively made and executed on renewals from time to time granted. Lord Chief Justice MANSFIELD, [*543 stopping the then Mr. Abbott, who was to have argued against the construction contended for on the other side, said, that the case of *Cooke v. Booth* was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of a deed: and, in another part of his judgment, his lordship says, that case had been impeached upon all occasions, and in which the Court of King's Bench were misled by the renewals stated in the case sent by the Court of Chancery. Now, what is asked for in the present case, but to assist the construction of an unambiguous deed by the prior acts of the parties? And, in a case which I argued as counsel, (b) though the lease there was according to the custom of the country as to the times of holding, yet the lease, dated 29th March, was held not to be a lease in possession, within a power to grant in possession, and not in reversion, because the days of holding were as to the tillage from 13th February past, the pasture ground from 5th April next, and the residue of premises from 12th May next.

But, my lords, in my opinion, no cases are wanting to prove, that no evidence can be admitted to explain a deed, which is plain and perspicuous in its terms, containing no ambiguity, much less to add clogs and conditions to it. I am asked then, is this a deed of that description? I answer that, in my opinion, it is. I see no ambiguity; it is precise and definite in the powers granted; every person of plain and common understanding, much more every person with a legal mind, can give it a clear and satisfactory solution. But, I am told, the case of *Fonnereau v. Poyntz*, 1 Bro. C. C. 472, before Lord Chancellor THURLOW, is against my opinion. I own, *upon the best attention I can pay that case, I do not think so. The case was a bequest of the sum of 500*l.* stock in long annuities, and similar bequests of smaller sums in the same stock to others. [*544

(a) See the original case and pleadings, 7 East, 237.

(b) *Doe dem. Allan and others, v. Calvert*, 2 East, 376.

The question was, whether this was a bequest of 500*l.* a year long annuities, or 500*l.* in the long annuities. The case was very powerfully argued by one of your lordships; I own I should have thought there was no difficulty in the construction; and Lord THURLOW seemed at first to be of that opinion, but afterwards admitted evidence to show the extent of the property of the testatrix, to see whether she could possibly mean 500*l.* a year when she had no such stock. But though his lordship admitted this, he states the clear principle of law to be that, for the wisest reasons, it will not admit of an instrument being construed *aliunde*. And, in the close of that case, his lordship says, what I quote to your lordships as strong in my favour, because he only lets in the evidence to explain what is uncertain, "There is no doubt, if the word *stock* had been left out, but the meaning would be that the sum of 500*l.* was to be disposed of in long annuities, and to make a produce, and that produce to accumulate until the legatee should attain twenty-one. This being the doubtful interpretation upon the face of the will, the question arises, whether the state of the testatrix's fortune is not applicable to the construction of the will. It appears by some other parts of the will that she was extremely anxious to make an ample provision for the family of the Fonnereaus; considering then, the situation of her fortune, it is perfectly inconsistent to say that she could mean to give ten times more than she was worth in legacies. My opinion therefore is, that the judgment must be reversed, and that I can let in the evidence of the value of the estate, not to control the bequests, which the testatrix has made in words themselves distinct, nor to control the bequest *which she had made of a subject which she has accurately described, but because the words she has used in the description are, upon the whole of the context, uncertain." "The peculiarity of this will furnishes sufficient doubt to warrant the admission of collateral evidence to explain it; and, if so, the statement of the testatrix's fortune is applicable to the purpose of such an explanation." His lordship, whether right or wrong in his notion, clearly admits evidence *at iuncte* on the ground of uncertainty and ambiguity only, and leaves the principle wholly untouched, that parol evidence, or evidence *aliunde* cannot be admitted to contradict, add to, or vary the terms of a deed, will, or other written instrument. Now, here, the terms of this power are clear and express, without limitation, clog, or condition, nothing being doubtful or ambiguous; and the evidence sought to be admitted is not to explain that which is doubtful, but to add two clauses or two conditions to that which is absolute and unconditional: in short, to make a new deed in this respect.

*545] The decision I am humbly recommending steers clear of all vagueness and uncertainty; leaving nothing to the variety of conflicting opinions. For, who is to decide what is reasonable? If the judges, as I should be inclined to think,—but worse, if the jury are,—what can lead to such contrariety of decision? For we all know, in every transaction of human life, what is reasonable or unreasonable must depend upon the reasoning and feeling of every individual man who has to consider the question.

I heard it said, this will unsettle many leases. I lament that it is so. The legislature may interpose; but, if my mode of construing powers had been always adhered to, no such evil could have ensued. The hardship of the individual case is represented; and, if there be hardship, I also, as an individual, lament it; and *this statement of hardship, and the consequences of what I should propose, have made me, again and again, examine this point with all the ability in my power: but, after all this consideration, feeling, that it is my sworn, and therefore bounden duty to declare what I believe the law to be now, not to say what it ought to be, I think, that, to decide in favour of the lease, would be to make a power different substantially from that which was made, and making conditions which the creator of it never intended. This would be my opinion, if I stood alone; but, I am happy not to be singular in

my judgment on this important question, although I am opposed to others whose ability I respect, and whose learning I revere.

BAYLEY, J. I am of opinion that the lease in this case is conformable to the leasing power, and that it is valid. Nor do I think that that opinion will trench on the case of *Coxe v. Day*. The settlement in this case requires "a power of re-entry for non-payment of the rent;" and the first question I propose to consider is, whether this lease does or does not contain "a power of re-entry for non-payment of the rent?" It provides, that, if the rent be behind for the space of 15 days, and no sufficient distress can be had upon the premises, the person entitled to the freehold and inheritance may re-enter. Is this then, or is it not, "a power to re-enter for non-payment of the rent?" Does it give any power to the landlord? Undoubtedly.—To do what? To re-enter.—For what cause? For non-payment of rent. It is, then, a power of re-entry for non-payment of the rent. I admit, it is not an immediate power of re-entry; I admit it is not an unconditional power; but still it is a power of re-entry. In referring to Littleton, s. 325, I find instances of powers of re-entry, if the rent be behind a week, or a month, or half a year; and, as far back as [*547] the Year-books, (a) it is established, that, under such powers, the time to demand the rent to warrant a re-entry is at the end of such week, month, or half-year, and not on the preceding rent-day; so that it is consistent with a power of re-entry, that it should not be immediate, but postponed till some given time after the rent should have accrued; and in Godbolt, 110, pl. 130*I*, I find the instance of a power of re-entry, if the rent be behind, and there be no sufficient distress upon the land; and, from these instances I infer, that a power of re-entry, if the rent shall be behind 15 days, and there is no sufficient distress upon the premises, is "a power of re-entry for non-payment of rent." It may not be the most beneficial species of power; it may be clogged with what, in some cases, may, by possibility, produce an inconvenience: but still it is a power. And, if it be a power of re-entry for non-payment of the rent, this lease does contain what (in the words of the settlement) is "a power of re-entry for non-payment of the rent;" and persons who impeach the lease are then driven to the argument, that, though it be a power, yet, it is not such a power as, having due regard to the intent and meaning of the indenture of the 2d July, 1757, that indenture according to legal construction requires. Now this argument assumes, that the words are capable of more than one meaning, if they are not so clear and precise and definite, as to admit but of one sense; and, it was to point out this assumption, that I have been troubling your lordships upon what might, otherwise, have appeared nearly a self-evident proposition. The words are "a power of re-entry for non-payment of the rent." The law knows of many such powers;—some more beneficial, some less so—some qualified—some not—[*548] some to hold the land till the rent is satisfied out of the profits;—some to hold till the rent is satisfied *aliunde*, Co. Litt. 203 *a*;—some, as here, to restore the reversioner to his former estate; and some with the conditions I have already noticed, viz. postponement of time, and absence of distress upon the land;—and some (though very few) with neither of these conditions. And which of these powers, having due regard to the intent and meaning of the indenture of 2d July, 1757, does that indenture, according to legal construction, require? The intent and meaning of that indenture is to be collected, either from that indenture, without looking out of it or beyond it, or from that indenture, combined with the consideration of the state of the property at the time when that indenture was made, if the evidence of the then existing leases, and of the powers therein contained (which I shall by-and-by consider,) be admissible. The intent and meaning of that indenture (*per se*, and without looking beyond it or out of it) was, as it seems to me, that the reversioner should have

(a) 20 H. 6, 30, 31; 6 H. 7, 3; Brooke, *entre congrable*, pl. 90

such of those powers as would give him *a proper and reasonable security* for his rent, by way of re-entry ; and that, if nothing short of a right of immediate re-entry, and of re-entry, whether there were or not a sufficient distress upon the land, would give him that security, I should say, he was entitled to such a power in the lease as would give him those rights ; but, if any of the other powers would give him a proper and reasonable security, it seems to me that giving him any of those other powers would be all the indenture of 1757, according to legal construction, requires. The rent is not a rack-rent. It is only *2l. 1s. 6d. per annum*, payable half-yearly ; and for a lease for three lives the lessees surrendered a subsisting lease, upon which, at least, one life was *in esse*, and **paid 105l.* A half year's rent, therefore, would be *1l. 0s. 9d.* [549] only ; and, for such a rent, a delay of 15 days was not likely to occasion the reversioner much probability of loss ; it was not likely the premises would ever be so completely deserted as to have no sufficient distress upon them ; nor was the rent such as could be any inducement to the tenant to re-plevy. For such a rent, the power in question to re-enter at the end of fifteen days, if there were no sufficient distress upon the premises, appears to me an adequate and reasonable security ; and I should be disposed to think that, for such a rent, a clause without giving any days of grace, would be unreasonable ; because I think the immediate exercise of such a right would be oppressive. Nor do I think it unreasonable to deny the reversioner the power of re-entry where there is a sufficient distress upon the premises, because the legislature did not think it unreasonable to deny the landlord the benefit of 4 Geo. 2, c. 28, where there was such a distress ; and because a landlord can have no difficulty in ascertaining whether there be such distress or not. He has a right to enter with his bailiff upon the premises, to see whether there be such a distress ; and, according to Godbolt, 110, if there be nothing that he can see upon the premises to distrain, he is warranted in concluding that there is no distress there. Godbolt's words are, "It was holden by all the justices, that if a man make a lease, rendering rent upon condition, that, if the rent be behind, and no sufficient distress upon the land, the lessor may re-enter ; if the rent be behind, and there be a piece of lead or other thing hidden in the land, and no other thing there to be distrained, the lessor may re-enter ; for the distress ought to be open and to be come-by." I am, therefore, of opinion that, without looking beyond the indenture of July, *1757, the power in question is, within [550] the true intent and meaning of that indenture and the legal construction thereof, as large and beneficial a power of re-entry as that indenture required.

But, I apprehend, that, in judging of the true intent and meaning of the indenture of July, 1757, in this respect, we are at liberty to look at the state of the property at the time that indenture was made, and see to what restrictions it was then subject, and what rights the settlor then had. The settlor has used the indefinite words, "a power of re-entry." By showing, as I do, that there are many such powers, I show, that there is an ambiguity in those words, either latent or patent ; and may I not refer to the existing state of the property at the time these words were used, to see what was the intention of the settlor, and in what sense she used those words ? This is the first time I have ever known it doubted, whether the estate, and interest, and powers of the settlor over the estate he was settling was admissible in proof. I am not offering declarations of what the party said she meant ; I am not construing a legal instrument by the acts of the parties, or by their understanding upon it (as in *Cooke v. Booth* Cowp. 819;) but, by showing the circumstances and situation of the party, and the estates and interest she had at the time, I am enabling the house to judge what, in legal construction, was her meaning. And, I am not aware, that there is any legal authority to exclude the evidence of such circumstances and situation. *Doe v. Calvert*, 2 East, 376, certainly is not. That case only decided,

that a lease of 29th March, of tillage land from 13th February preceding, of pasture land from 5th April, and of the residue from 12th May, reserving the rent in April, was substantially a lease from April, and, therefore, a lease not in possession but in reversion; and the custom of the country, that these [*551] were the ordinary periods of letting was admitted without objection, and argued upon without objection, but was held not to contract the power so as to warrant a lease before April. If a man makes any deed or will, have I not a right to know what estate he had at the time he made such deed or will; and, does not the construction vary, in some cases, according to the estate? If I grant a man an estate for life, without saying whether for his life or mine, is not evidence admissible to show what interest I had in the premises? For, if I was tenant in fee, he will take an estate for his own life; if I was tenant in tail or for life only, he will take for mine. 1 Shepp. Touch. 88. If a man bequeath me 10,000*l.* 3 per cent. consols, it will be a specific legacy if he have that stock at the time;—not specific, if he have it not, *Selwood v. Mildmay*, Per M. R. 1797, 3 Ves. 310. Evidence is, therefore, admissible in such case to show what was the state of his property at the time he made his will, and the construction upon the will is one way or the other, according to the result. In *Masters v. Masters*, 1 P. Wms. 421, where a lady by her will gave 5*l.* to each of two hospitals in Canterbury, and by her codicil gave 5*l. per annum* to "all and every the hospitals," the latter legacy would have been void for uncertainty; but it appearing (which must have been by extrinsic evidence) that the testatrix lived at Canterbury for many years, and died there, and that she took notice by her will of two Canterbury hospitals, the general words "the hospitals" were limited and considered as intended for "all the hospitals in Canterbury." But the case to which I wish to call your lordships' particular attention is *Fonnereau v. Poyntz*, 1 Bro. C. C. 472. The testatrix, there, gave to Mary Poyntz the sum of 500*l.* *stock in long annuities;—to Mary Haye the sum of 500*l.* stock in long annuities;—to Miss J. L. Barbauld the sum [*552] of 200*l.* stock in long annuities; the interest thereof to accumulate till she attain 21;—the sum of 100*l.* stock in long annuities to Miss H. Dawson in like manner;—and the residue of her estate both real and personal to her two nephews. Parol evidence was given that the testatrix had only 120*l. per annum* long annuities; but Lord THURLOW doubted at first, whether he could admit that evidence to explain the words; and he afterwards decreed against receiving it, because he thought it would produce a construction against the direct and natural meaning of the words. But, upon a rehearing, he admitted the evidence, and acted upon it;—and the ground of his decision was, that, upon the face of the will itself, it was doubtful whether the testatrix meant to give legacies of 1300*l. per annum*, or only a gross sum of 1300*l.*; and he considered the state of the testatrix's fortune applicable to the construction. The situation of the fortune made him conclude, she never could have meant to give in legacies ten times more than she was worth; and he let in the evidence not to control a bequest which was distinctly and accurately described, but because, upon the whole context, it was uncertain whether she meant so much *per annum* or so much as a gross sum. He thought the peculiarity of the will furnished sufficient doubt to warrant the admission of collateral evidence to explain it; and that the statement of the testatrix's fortune was applicable to the proof of that explanation. Lord THURLOW decided that, therefore, as a case of ambiguity;—as a case, in which, from the use of the "sum of 500*l.* stock" and the "interest thereof," he might let in the extrinsic evidence of the circumstances of the testatrix to explain what was her meaning. In noticing *this case, 3 Ves. 320, Lord ALVANLEY says, Lord THURLOW's only doubt was, whether [*553] parol evidence was admissible to ascertain whether the testatrix did not mean capital, but he had no doubt he must know all the circumstances of her affairs. Apply that case to this. The evidence here is not to produce a construction

against the direct and natural meaning of the words ; not to control a provision which was distinct and accurately described ; but because there is an ambiguity upon the face of the instrument ; because an indefinite expression is used capable of being satisfied in more ways than one : and I look to the state of the property at the time, to the estate and interest the settlor had, and the situation in which she stood with regard to the property she was settling, to see whether that estate, or interest, or situation would assist us in judging what was her meaning by that indefinite expression. And, then, the case will stand thus :—Lady Louisa Barbara Vernon being tenant for life with power of appointment in fee of a very considerable estate, part of which was then out upon leases for lives at small rents, payable partly in money and partly at her election in fat capons, subject to powers of re-entry if those rents should be behind 15 days and there should be no sufficient distress upon the premises, settled that estate with powers to make life leases of that part of the estate at the ancient rents, so as those leases should contain *a power of re-entry* for non-payment of the rent thereby reserved ; and with power to make leases at rack-rent of the other parts of the estate, so as those leases should contain clauses of re-entry if the rent were in arrear 28 days ; and, then, the question is, whether, by requiring upon the life leases generally "*a power of re-entry*," she required more than [554] that description of power which the *then life leases had. She must be taken to have known what that power was ; and had she been dissatisfied with it, or required any alteration, can it be supposed she would have contented herself with the indefinite expression "*a power of re-entry*?" When she is providing for the rack-rent leases, where the right of distress is much more important, she gives the tenant 28 days ; and, can it be believed, that she intended to be less indulgent where the rent bore scarcely any relation to the value of the property ? I cannot believe she did ; and for these reasons, because the settlor has not said what particular species of power she required, and this is a reasonable power, and the very power in force upon this estate at the time this settlement was made. I submit to your lordships, that this lease was warranted by the power, and that the judgment of the King's Bench ought to be affirmed.

Wood, B. My lords,—In answer to the question proposed by your lordships, which is,—“Whether having due regard to the true intent and meaning of the indenture of the 2d July, 1757, according to the legal construction of the indenture, as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th December, 1803, as the same is stated in the special verdict is for any and what reasons invalid?”—I am of opinion that the power contained in the marriage settlement is well executed.

That power applies to lands “leased for lives or for years determinable on lives, to any person or persons in possession or reversion ;” and one of the conditions of such letting is in these words, “and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved.” There is another power of re-entry which applies to *leases [555] for years absolute, not exceeding 21 years, to take effect in possession, and to be made at as beneficial yearly rent as was then paid, or the most improved rent without fine or fore-gift ; and there it is provided, that there be contained a clause of re-entry, in case the rent or rents thereupon to be reserved be behind or unpaid by the space of 28 days after the time appointed for payment.

The lease in question is under the first power, which provides re-entry on non-payment of the rent generally, without prescribing any time of re-entry at all, or any special terms whatsoever. The proviso in the lease in question is,—if the yearly rent of 2*l.*, or any of the duties, services, reservations, and payments thereby reserved shall be behind, unpaid, or undone in part or in all, by the space of fifteen days after any of the times of payment or performance, and

no sufficient distress or distresses can be had or taken whereby the same and all arrearages may be raised. It is contended on the part of the defendant in error, that this proviso of re-entry in the lease is not such a one as is required by the settlement, inasmuch as it has limited a time for re-entry, which the power has not; and, inasmuch as it is clogged with a condition, that there be no sufficient distress, which the settlement does not mention.

The clause requires no more than a power of re-entry for non-payment of rent, giving it no qualification or modification at all. There is a clause of re-entry, and that is a literal compliance. But though the power is general, I admit it must be executed, not in a fraudulent or illusory manner, but in a reasonable manner; such as the law will deem reasonable. In the clause of re-entry for the rack-rent, the time is limited, viz. 28 days. I admit that cannot be departed from. Why was no time limited in this? Because the settlement meant to leave it to the discretion of the tenant for life, to insert *such a reasonable power of re-entry as might secure the rent to the reversioner. [*556] The object of re-entry is merely to secure the rent, and has been always so considered in law and equity; and when I see that object is secured reasonably and fairly, and we are not tied down to any specific terms, I think the power is well executed, being according to the intention of the parties. I think we ought to consider the deeds and acts, *ut res magis valeat quam pereat*. In *Cother v. Merrick*, Hardr. 89, in the Exchequer, on a special verdict, the question was, whether the lease was a good lease within the statute 32 H. 8, c. 28. That statute is to enable tenants in tail to make leases to bind, as if they were tenants in fee simple. The second section is, provided such leases be not for more than 21 years, and provided that upon every such lease, there be reserved payable to the lessors, their heirs and successors, to whom the said lands should have come after the deaths of the lessors, if no such lease had been thereof made, and to whom the reversion thereof shall appertain, according to their estates and interest, so much yearly ferm or rent, or more, as had been accustomedly paid. The lease was made reserving the rent to the heirs and assigns of the lessor, who were not the heirs in tail entitled to the rent, yet it was held a good lease. HILL, B., says, "In the exposition of statutes, the judges must make such a construction as to advance, and not to frustrate the intention of the makers." PARKER, B., says, "It is the office of a judge to preserve and not to destroy an estate." In this case the judges gave their rational construction to the lease, which gave it effect. So, here, in this case before your lordships, I conceive we ought to do the same, taking the true interpretation of the power to be to leave the mode of re-entry to the direction of the lessor. Has that been *fairly and *bond fide* and reasonably executed? Is the period of 15 days [*557] a reasonable time to allow for re-entry? In the case of rack-rent, 28 days is expressly given; if the parties have thought that a reasonable time, surely, the 15 days must be; it is the usual time as found by the jury; the law will judge what is a reasonable time.

The last objection, which was mostly, if not entirely, relied on, was the clogging the right of re-entry with the condition of there being no sufficient distress. Is that reasonable, with reference to the law, as it stood, when the lease was made? I conceive it is. The 2d July, 1757, was the date of the deed of settlement, which gives the power of leasing, and which was subsequent to the statute of the 4 Geo. 2, c. 28, which was in the year 1731, which regulates the powers of re-entry for the non-payment of rent. Before the making of this statute, the carrying into execution a power of re-entry was attended with great difficulty and nicety. There must have been a demand of the rent upon the land; if there were a house, it must have been demanded at the fore door; and it must have been demanded at a convenient time before the sun-setting of the last day of payment, so as that money might be numbered and received. The landlord then had to make an actual entry and bring an ejectment. If all these

circumstances were not *critically* and *exactly* performed, he lost the right of re-entry for that time, and was forced to wait till other rent occurred; and then had to make fresh demand and re-entry for the subsequent rent. If he had complied with these formalities, and brought his ejectment, it was the uniform practice of a court of equity to relieve against a forfeiture upon payment of the rent and costs, considering the clause of re-entry as a mere security for payment of rent. What is the alteration made by the statute; it has dispensed with the formalities attending re-entries at the common law, and said that when [558] the landlord has a right to re-enter, and half a year's rent is in arrear, he shall and may at once bring his ejectment, and recover possession, provided there is no sufficient distress to be found on the premises to countervail the arrears then due. The tenant, also, may pay or tender the rent and costs to the landlord or his attorney, or pay the same into court before trial, and all proceedings shall cease. The policy of this law is to prevent forfeiture for non-payment of rent, and to facilitate the landlord's remedy for the recovery of it: and, at the same time, the legislature has thought it right to impose this condition:—you shall not eject the tenant if there be a sufficient distress to secure the rent; you may have an action or a distress as soon as the rent is due, without waiting fifteen days. It is said, "still the statute leaves the common law remedy open to a landlord, if he will comply with the formalities of the demand at the last hour of the day, and make re-entry; and, in that case, the necessity of distress is not imposed on him." What then? Why the tenant will be relieved against the forfeiture in a court of equity; yet it does not seem clear, even in that case, that the statute does not shut the door against proceedings by re-entry at the common law; but, upon that, I do not find my opinion. The words of the statute are, "that the landlord shall and may bring ejectment;" and *shall* is imperative. Under the statute of 8 and 9 W. 3, c. 11.—An act for the better preventing frivolous and vexatious suits in actions for penalties for non-performance of covenants,—the plaintiff *may* assign as many breaches as he shall think fit. It was at first contended that the statute was not compulsory on the plaintiff to assign breaches; for, that the statute was made for his benefit, and therefore he might waive it, and leave the defendant to his remedy in equity: [559] but all the courts in *Westminster Hall held it to be compulsory on the plaintiff to assign breaches and assess damages, and the defendant shall not be put to seek relief in equity. This is the fair construction to be put on the statute of the 4th Geo. 2, where the words are stronger, being "shall and may;" and, upon the same principle, if this be the true construction of the statute, and there is no decision to the contrary, then there is an end of the question; for the lease will then have expressed no more than that condition which the statute requires. It might not be necessary to express the condition, because the law imposes it. But I will suppose it to be left open to the landlord to proceed in the old way, as before the statute, and a reasonable clause of re-entry is all that the power required; can the adoption of the same condition which the legislature has adopted in similar cases, be considered as unreasonable? The case of *Coze v. Day*, 13 East, 118, has been cited as an authority of the Court of King's Bench, that the inserting a condition of re-entry in a lease made under a power in these words, "in case no sufficient distress can be taken on the premises," they not being in the power, was not a good execution of that power. I doubt very much the propriety of that decision; but, be that case as it may, it is different in one material feature from the present case. The re-entry required was for non-payment of the rent reserved by the space of twenty-one days; so that there was a specification of a particular mode, and therefore it, perhaps, might be inferred no other qualification would be warranted. Here no time is limited: a power of re-entry generally is all that is required; and, therefore, I think reasonable qualifications may be made.

In this present case, which was only a few years afterwards, the same court

thought this power well executed. *They must have thought their former decision was wrong, or that this case was distinguishable from it: Lord ELLENBOROUGH and Mr. Justice BAYLEY sat upon both those cases. But, whatever may be the construction upon the statute of the 4 Geo. 2, I do not rest my opinion upon that. My opinion is founded upon this, that the power of leasing leaves it to the discretion of the lessor to make a reasonable lease: and that the power of re-entry, which is contained in this lease, is a reasonable one; and, therefore, I think that the lease is not invalid.

GRAHAM, B. In answer to the question proposed by your lordships, I have to submit, that, in my opinion, the demise of the 5th September, 1803, is valid; and as so much difference of opinion appears to exist on the subject, I feel it incumbent on me to offer to your lordships the reasons which have led me to the formation of mine.

My lords, the question arises out of the settlement of Louisa Barbara Mansel (made on her marriage with George Venables Vernon, afterwards Lord Vernon,) of the 20th July, 1757, to the uses of the parties, and issue of the marriage, and finally to the use of her appointment by will, and in default of such, to her right heirs. Lady Vernon, by her will of the 5th August, 1803, gave the lands demised to her by her father, Lord Mansel, and included in that settlement, subject to her husband, Lord Vernon's life estate, to Thomas Lord Clarendon for life, (who is since dead,) remainder to William Augustus Henry Villiers Mansel in fee, under whom the lessors of the defendant in error claim.

Lady Vernon died in 1786, and Lord Clarendon and Lord Vernon before the day of the demise. The proviso in the settlement which raises the question, is this, "That it shall be lawful for George Lord Vernon, and Lady Vernon, from time to time during their respective lives, when in possession, or entitled to the rents and profits of the lands so limited, to [561] demise on lease such parts of the lands as now are leased for life or lives, or for years determinable on the dropping of a life or lives, to any person or persons in possession or reversion, for one, two, or three lives, or for any number of years determinable on the dropping of one, two, or three lives, so as there be not any greater estate or interest subsisting at one time, than what will determine on the dropping of three lives, and so as on every such lease *there be reserved the ancient and accustomed yearly rent, duties and services*, or more, or as great as now are, or at any time were reserved, or a just proportion, (except heriots, which may be varied, altered, or compounded for, at the will of Lord and Lady Vernon,) such rents, duties, and services to go along with the reversion, or remainder of the premises expectant on the determination of such leases; "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." There is, then, the usual power of leasing the other parts of the lands, for years not exceeding 21; "so as there be contained a clause of re-entry in case the rents be behind, and unpaid, by the space of 28 days after the times appointed for payment thereof." Thirdly, a power of leasing mines guarded only by the usual covenants.

On the 5th of September, 1803, Lord Vernon, then tenant for life, executed the lease in question. It contains, after the usual reservation, a covenant for the lessees to pay yearly at Michaelmas, and Lady-day, the yearly rent of 2*l.*, and the said duties, heriots, &c.; there are other reservations, such as a pair of fat capons, or 1*s. 6*d.** at the election of the person entitled to the rent, a heriot of 40*s.* and also doing suit of mill at the mill of Lord Vernon, or other person entitled to the inheritance. All these directions are strictly observed [562] in the lease, yet how the penner of the lease was enabled to be correct in those reservations, but by the aid of the then subsisting, or former leases, I cannot readily conceive. But it seems he is mistaken, though with the same guides, in the clause of re-entry for non-payment of rent; for it is said he has unwarrantably, and without authority or power, given 15 days respite, and an

nected a qualification that no sufficient distress can or may be had on the premises, whereby the arrearages of this 1*l.* half-yearly rent may be fully raised, levied, and paid.

And the question is, whether this lease with a clause of re-entry so qualified, is a proper and valid execution of the power created by the settlement? Whether it be so or not, must depend on these considerations, viz. whether it is substantially conformable to the intention of the creator of the power, suitable and adequate to its object and purpose; and not injurious or inconvenient to the person next in remainder or succession.

I will not trouble your lordships with cases, to show that powers of this kind should receive a liberal construction. I ask only the construction of plain common sense: but, as these powers pervade the settlements of all the great and potent families of the kingdom, it is important that the execution of them should not be avoided on slight or immaterial departures, even from a prescribed form, still less where no specific form, but a general direction is given. A prudent father, tenant for life, with such a power, makes his leases with the fairest intention; he provides for his wife and younger children by his savings and personal estate; his eldest son succeeds him, and, upon an objection of this kind, avoids his leases, and the personal estate of the father is exhausted to indemnify the lessees. This consideration would, I may presume, dispose your lordships not to be rigid in the construction of the execution of these powers, but to give effect to them when they are fairly and honestly executed, and without injury, or sensible inconvenience to the remainder-man.

*563] What, then, did the maker of this power mean by the words "so as there be contained in every such lease a power of re-entry for non-payment of the rent?" The maker does not say what power,—he prescribes no form of the clause. What is it, but a general direction to insert a clause of re-entry because of non-payment of rent, that is, where the rent is not duly paid? This general direction was never intended to be inserted verbally in the future lease; it left the verbal exposition and specific form of the clause to further care and provision; no conveyancer would think of transcribing the terms of this general direction. Besides, "*a power of re-entry*" for non-payment of rent necessarily implies a selection of one out of several. It might be a power of re-entry at common law, or under the statute, or, what is likeliest of all, a power such as had been inserted in all former leases of the same subject, and in the very lease which was surrendered to make way for the present. I repeat it, therefore, that this general direction necessarily calls for the exercise of judgment in preparing the clause. I speak not of a definitive judgment, that must ultimately rest with a court of law, or equity; but of a judgment of the person who executes the power, or his conveyancer, as to what power is meant; the answer to which, to me, appears obvious, clear, and necessary,—a power fit, suited, and adequate to the occasion. Then, what is the object and occasion? The coercive means of enforcing the payment of rent: for my error, if it be an error, is this, that clauses of re-entry are intended for that purpose only, and that courts of equity would, at no time, suffer them to be used for any other purpose; and that, if the clause of "re-entry in this lease had been unqualified, as it is contended it ought to have been, a court of equity would have enjoined the landlord, on payment of the rent in arrear, and costs; so that the remainder-man would not have been at all the better for the unqualified clause. Looking, therefore, at this general direction as referring to the exercise of some judgment or discretion to be used in the formal execution of this power, let me consider in what manner a tenant for life most anxious to execute it with scrupulous fidelity, would act. He would consult his man of the law. This lawyer reads this general direction, he finds he must look into former or subsisting leases, to know, first, what lands were formerly letten for leases; secondly, what the rents were before, and at the then moment; thirdly,

what heriots had been heretofore reserved, what duties, what other reservations were to be made and secured. Could he forbear, or would he be bound to forbear to look into the clause for non-payment of these nominal rents? Were he so bound, I should much regret that the law had established a rule which excluded the very best information he could obtain. But suppose that he must shut his eyes to those clauses in former leases and in the very subsisting lease of the same lands, he must, in the first instance, consider what is a fit and proper clause for the purpose. He would naturally say, I cannot pen this clause in the language of the settlement; and, if I make it without any qualification by a more obvious and easy means of obtaining the rent, I make it a re-entry at common law, with all the inconveniences attending it, and its ultimate control in a court of equity. He would, therefore, conclude that he had better take the statute of the 4th Geo. 2d, c. 2, for his guide, and pen the clause in the manner which that statute seems to have pointed out, on a view of the law and equity applicable to that subject. I cannot be supposed to *mean that [*565 this first exercise of judgment in preparing a proper clause could ultimately weigh, if, in the execution of the power, the lawyer had misconstrued its meaning and the intention of the maker; nor can I be supposed to mean that the validity of the execution of the power could properly be left to a jury; —the decision on that point could only be by a court of law or equity.

I have said that the clauses for re-entry in the former and subsisting leases were a proper guide to the exercise of discretion in preparing those clauses; but I say it, subject to the doubt which some may entertain; and, if I am not allowed to use that evidence, I do not feel that the argument in support of my view of this question is much impaired; though, with that evidence, the point is decided. But I take this to be a case very different from *Cooke v. Booth*, which I know has been overruled by many subsequent approved decisions. In that case the Court of King's Bench were called upon to put a construction on a written and explicit covenant of no ambiguity; or if any, of a patent ambiguity; it was a covenant to grant a new lease, on the dropping of one of three lives, for the lives of the two remaining and the third life under the same rents and covenants. But this is not a question on the language of a written instrument; it is impossible to contend, that it should be literally transcribed into the clause; it must have some modification: and, if you admit any, you admit the exercise of common sense and the consideration of the fitness and propriety of the power; and, to my apprehension, you admit inquiry as to what clause of re-entry the settler meant. She has bid you look to former leases as to the lands so usually letten, the usual rents, heriots, services, and covenants for their recovery, and for doing suit at the mill; has she not, therefore, bid you look for what was the usual and proper clause of re-entry for non-payment of those nominal rents? *This extrinsic evidence is not resorted to for the purpose of explaining the written and unfolded language of an instrument, [*566 but as a guide how to unfold, and prepare a future instrument under a general direction, to observe in all particulars what had theretofore been done. That is the substance of all the restrictions;—“do, as has been done heretofore.” But I do not wish to involve the case in this discussion; though, for my own part, I think, the facts found by this special verdict and rightly admitted in evidence decide the question.

As to the question arising on the assumption, that the giver of the power meant that the clause of re-entry should be simple and absolute, it is said, with great impression on many, that there is a manifest distinction between a simple power of re-entry, and a power clogged, as it is said, with a condition or troublesome qualification; but the question is not on a difference of terms, but on a difference in substance and effect; a difference which may sensibly injure the remainder-man; not on a difference which leaves him effectually in the same situation, or, as I think, in a situation which may be proved to be better

To judge of this, let me suppose, that a clause, such as has been suggested, had been inserted in the present lease ;—how would it have availed the remainderman ? He must have begun by a demand of his rent of 1*l.* at proper time and place. It is hardly necessary to quote Co. Litt. 153 a, 154 a, 201 and 202, to show with what punctilious and expensive accuracy this must be done ; the preamble of 4th Geo. 2, sufficiently shows how much those niceties were felt as impediments. He must then, with as much trouble and expense serve his ejectionment, and for a rent arrear of 1*l.*, and he is immediately met, first, by the disgrace of such a proceeding, and then by a bill in equity, with a tender *567] *of his 1*l.* and costs. I may presume, that it was the knowledge and prevalence of this equity, that gave occasion to the statute 4th Geo. 2d, which empowered the courts of law to exercise the equitable jurisdiction, and provided, on the one hand, an easier remedy for the landlord to enforce the payment of his rent ; and, to the tenant, a more prompt and less expensive relief, when powers of re-entry were abused. I do not contend, that this statute has taken from the landlord his right of reserving to himself a power of re-entry absolute ; but it excludes him from all benefit under the statute, if he does not pursue the steps which it points out ; and, when a question arises, as here, of a fit and proper power of re-entry for non-payment of rent, what better guide presents itself for the judgment of a man, who is to prepare the clause, than the directions of a statute framed on the view of all the legal rights of the landlord, and the equitable relief of the tenant ? And, we may remember, that, when this power was created, the statute of 4 Geo. 2 had passed many years, and its operation was known and prevalent.

My lords, I have said, that the giver of this power meant by the words used, a power fit, and suited, and adequate to the occasion ; that is, to its proper and allowable use, the security and enforcement of the payment of the rent : and, I take it for a clear principle of equity, that the landlord shall use it for no other purpose. But, two inconveniences are pointed out, as affecting the remainderman ; first, that of proving that there was no sufficient distress on the premises ; secondly, the delay and expense of a replevin. The first is applied to an estate for lives, where the rent is merely nominal and intended only to preserve the relation of landlord and tenant and the right to future fines. It is almost impossible to suppose property of that kind so dismantled as that the landlord *568] should be put to any *difficulty to find a cow, or horse, or piece of furniture to pay a rent of 1*l.* : and, with respect to the second difficulty, the same may be said of the improbability of any replevin for so small a rent. But, the best answer is, that, if the clause of re-entry stand ever so absolute, the tenant, though he would not be heard in equity to say that there was a sufficient distress on the premises, could stay the proceedings at law on payment of the rent and costs ; for, I take it, that it was always and originally in the jurisdiction of a court of equity to relieve against clauses of re-entry for non-payment of rent, where the tenant was ready to pay the rent, or to give better security, if required, for the punctual payment of it ; whatever doubts the courts of equity might entertain of clauses of re-entry for breaches of other covenants, where it might not be so easy to place the landlord in that situation with regard to his property, which he had a right, by all means, to secure to himself.

My lords, with respect to the cases cited, I shall confine myself to a very few observations on only two,—those of *Coxe v. Day* and *Hotley v. Scot.* With respect to the former, I am reported to have expressed myself too strongly by saying, that it was contrary to law and common sense ; and those expressions have been justly animadverted on by one of my learned brethren. I do not recollect to have used such expressions, as applied to that case ; but, if in the warmth of argument, any such expressions did escape me, I have only to regret that I have been so faithfully reported. This, however, I may say, that, from my manner of introducing my own opinion, I could not fairly be under-

stood to mean an attack on that authority so unbecoming. I certainly mentioned that case as standing in the way of the present decision, and opposed to it the contrary decision of *Hotley v. Scot*, that, in that equipoise of authorities, I might more fairly exercise my "own judgment; and I said upon that occasion, [*569] what I now repeat, that, notwithstanding the imperfect printed report of *Hotley v. Scot*, it is impossible to read Mr. Butler's note, (whatever may be said of his then youth and inexperience,) and not to see, that the point of the effect of a qualification similar to the present was distinctly made, argued upon, and overruled;—Lord MANSFIELD saying, as I apprehend, with perfect accuracy and truth, that the clause was a reasonable one and conformable to the statute of Geo. 2; and that clauses of re-entry for non-payment of rent were, in equity, considered only as the means of enforcing the payment of it. But, perhaps, your lordships may think the case of *Coxe v. Day* distinguishable from the present. The observation of my learned brother, who first delivered his opinion, is material: and, in that case, there was no reference, nor necessity of reference, to former leases, as to what lands should be letten, what ancient rents, what heriots, *suits*, duties, or services should be secured. It was a power to lease *any* of the lands, with the single qualification, that the leases should reserve the best and most improved rents.

The decision of the Court of King's Bench in the present case, may be thought to throw some doubt on *Coxe v. Day*; and, all the cases considered, the present is open to your lordships' decision. I humbly offer my opinion, that the lease in question is not, for any reason that I can suggest, an invalid execution of the power.

RICHARDS, C. B. My lords, the question arises upon a deed of settlement made on the marriage of Lady Vernon, by which her ladyship was made tenant for life with remainder to Lord Vernon, her intended husband, for life, with powers of leasing, which were given to each of them as they should happen to be in *possession of the premises. One power is to lease the mineral [*570] lands, in which there is no clause of re-entry at all; the power mentioned secondly in the settlement, is to grant leases at a rack-rent, with a proviso for re-entry in case the rent be in arrear for 28 days: In that case, there is a power of re-entry required in the lease to be granted for non-payment of the rent: but, there is an extension of the time from the days fixed for the payment of the rent to 28 days. The clause is to be introduced into a lease, in which the rent and the occupation run together, and are considered as of the same value, the rent is paid and payable for the year, during which the enjoyment of the premises has been had; yet, by the power in that case, there is expressly an extension of 28 days given for the payment of the rent. The power now in question, my lords, authorizes Lord and Lady Vernon, as each of them shall come into possession of the premises, to grant leases of such parts of the land as were then leased for life or lives, so as there be reserved the ancient and accustomed yearly rents, duties, and services.

My lords, it seems to me impossible to ascertain what lands were then leased for life or lives, without looking into the leases and other instruments, which were produced at the trial; and the production of the same instruments is equally necessary to show what the ancient and accustomed yearly rents were. In this view of the case, as it seems to me to be impossible to consider the effect of these powers, without looking to the instruments to which I refer; it follows that, in my judgment, they were properly admitted in evidence at the trial. Then come the words of the clause in question, viz. "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." A more general power can never be expressed; It is not clogged with any *qualifications: It requires only a clause of [*571] re-entry "for non-payment of the rent;" not *on* non-payment of the

rent. There is no allusion to an immediate entry *for* or *on* non-payment of the rent, but a clause of re-entry generally for non-payment of the rent.

Now, my lords, in this last case, which is the case before your lordships, the lessee pays the fine contracted for to the tenant for life, the lessor, at once—in the very commencement of the term. The tenant for life receives at that time the whole value of the lease and of the premises demised, except the nominal rent of *2l. per annum*, and the small duties ; and it can hardly be supposed it could be the intention of the parties to the settlement, in a case where the lessee paid all the value at the first instant, that he should be in a worse condition than the lessee under the other power, paying rack-rent, who was not to pay any rent until he had enjoyed the possession of the premises ; and to whom an extension of *28 days*, beyond the time fixed for payment of his rent, was given.

Now, my lords, Lord Vernon intending to execute this power, executed the lease in question, containing a power of re-entry for non-payment of rent, with this proviso, “that if it shall happen at any time during the said estate hereby granted, that the said yearly rent or sum of *2l.* and every or any of the duties, services, reservations, and payments hereby reserved, or any part thereof shall be behind, unpaid, or undone, in part, or in all, by the space of *15 days* next over or after any or either of the days or times, whereat or whereupon the same ought to be paid, done, or performed, as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same and all arrearages thereof, if any be, may be fully raised, levied, and paid,”—it shall and may be lawful to and for Lord Vernon, or the person *572] to whom the “freehold or inheritance shall belong, to re-enter : and the question before your lordship is, whether this proviso is agreeable to the power, which directs, that, in the lease, there should be a power of re-entry for non-payment of rent ?

There are two objections stated ; the first is, that, in the lease, the time for the payment of the rent is extended to *15 days*, whereas it is insisted, that the re-entry ought to have been immediate, and at the time when the rent was received to be payable. The second objection is, that the re-entry is given in reference to a want of a sufficient distress.

My lords, it is clearly established, that the construction of powers is to be governed by the intention of the parties who make them, that intention to be ascertained by a fair interpretation of the language in which the power is worded ; in this case, Lord and Lady Vernon, uniting in marriage, may be considered, under their settlement, as owners of the estates ; though, before marriage, it was her ladyship's property. By this settlement, they propose to grant leases to all who choose to take them upon the terms mentioned in the powers ; one of which, relating to the property under consideration, is, that the lease should contain a condition of re-entry for non-payment of rent. My lords, it has been considered and has been ruled in many cases, that, in the construction of powers, the courts ought to be as liberal as may be ; and more liberal in favour of a lessee where the power is executed by the person, out of whose inheritance the estate issues, than when /executed by a third person, a stranger. It has been contended, that, in this case, the estate moving originally from Lady Vernon, Lord Vernon was to be considered as a stranger, and, that there ought, therefore, to be a greater strictness applied with regard to the lessee, than if he *573] was originally the owner of the estate ; but I beg of your *lordships to observe, that, in this case, Lord and Lady Vernon had, each of them, when in possession, the same power to grant leases ; the words of the power are precisely the same as applied to each of them, and must be construed as much to apply to a lease made by Lady Vernon, as to this lease made by Lord Vernon ; and, therefore, they must be construed with the same attention to the meaning, as if the words were applied to a lease by one or the other, and we are bound to consider, in construction, the lease in question, as if made by Lady

Vernon, from whom the estate originally moved, and who may fairly be considered as in a situation similar to the case which I am about to mention, and upon which, some of your lordships can have no doubt. Suppose a landlord, seized in fee simple, enters into an agreement in writing with a man to grant him a lease for a number of years, with a right of re-entry for non-payment of rent at the time specified. Suppose a bill filed in a court of equity by one or the other of the parties for a specific performance of the agreement. The court would refer it to a master to settle the terms of the lease; and any gentleman, who has ever sat in a court of equity, must admit, that the court will, if applied to, direct the insertion of a power of re-entry upon reasonable and usual terms; and, unquestionably, extend the time of re-entry to a reasonable time beyond the time fixed for payment of the rent; referring at the same time to a sufficiency or deficiency of distress, as in the present lease. I mention this case of an agreement, because it seems to me to apply very closely to the case before your lordships. Courts of equity adopt the same principle and practice in hundreds of instances, such as leases by guardians of infants, committees of lunatics, and the like. The court so acts, because it executes the intention of the parties: and a court of law, in construing powers, is equally bound to adopt the *intention of the parties creating the power: and there is no difference in the construction of words in a power, and of words in any [*574] other instrument. My lords, suppose Lord Vernon had agreed to grant a lease pursuant to his power, and had not granted it; and there was a bill in equity filed to compel him, or by him, to compel the person who had agreed, to execute the lease according to the power; the court would, I doubt not, direct a lease to be executed with a power of re-entry upon the usual and reasonable terms, which would be according to its construction, according to the intentions of the parties creating the power; and, I presume, the lease to be executed under the orders of the court would be similar to that which has been executed in this case. I am more willing to refer to the proceedings of a court of equity, because I am speaking in the presence of those, who have, perhaps, more knowledge and experience, than any persons of the present or any former times.

My lords, I understand from extensive information, and my own experience, such as it is, justifies me in believing, that the practice of all conveyancers has been consistent with what I have stated now, so far as the extension of the time is concerned; and, if it be so, it certainly must be considered as founded upon the intention which is ascribed to the party making the power; for, it is obvious, that, if the power, as it is contended, required a right of re-entry at the moment the rent was due, the enlargement of the time would be, in some degree, unjust to the reversioner, as it would cause a postponement of the day of payment: but the practice has been, I believe, so general, that it must be strong evidence of the intention ascribed; and so inveterate, that it would be very highly dangerous to affect it: and I have always understood that the judges have always considered a universal or very general practice amongst *convey-[*575]ancers a sufficient ground for their decisions, though they did not entirely approve of the principles on which the practice had proceeded.

On this point, viz. the extension of the time, I have been always inclined to support the lease, and I am of opinion that the objection ought not to prevail.

With respect to the other objection to the lease, viz. that a re-entry cannot be had unless no sufficient distress can be had upon the premises, I do not find, from the best inquiry that I have made, that any very general practice or understanding upon the subject, namely, with respect to the execution of powers, has prevailed amongst the conveyancers, and I have not been able to find that any decision has yet taken place, by which I am, in a judicial point of view, bound to abide. I must confess, that I was, for some time, convinced by the reasoning so strongly pressed by some of my learned brothers, and that I formed an opinion on this part of the case agreeably to theirs, from whom I am now

under the necessity of dissenting ; but your lordships' commands have obliged me to reconsider the case, and I feel great consolation in having had the opportunity, as I hope that I have been able to take a more correct view of the subject.

The objection to the part of the lease, with which I am now troubling your lordships, is certainly greatly supported by the inconveniences imposed on the reversioner ; but, if I am right in deeming the lease good, notwithstanding the extension of the time for the payment of the rent, it must be because it is agreeable to the true intent and meaning of the power, though there are no words that expressly allow that extension. If so, it may be right to presume, that the words used in the power meant more than is expressed, and that any right of re-entry on reasonable and usual terms, so far as the extension of the *576] time is concerned, is good. If *so, what prevents us from inquiring whether the other terms are reasonable and usual, I mean with respect to the distress ; and from holding, that, if they are usual and reasonable, they are within the power ? It cannot, I think, be said, that the circumstance of the want of a sufficient distress can be considered as imposing any condition either not reasonable or not usual. Every one's experience shows, that in leases in general, it is not only usual, but most general, and it cannot be supposed to be otherwise than reasonable ; and the leases produced in evidence, which, I think, were properly received, prove the existence of this clause in all of them, as applied to the power.

It is observable, however, my lords, that the power now under consideration is the first in the settlement : it requires, in very general terms, that, in every lease pursuant to it, there should be a power of re-entry for non-payment of rent, or because the rent is not paid ; it does not specify any qualification or condition, and only requires that clause of re-entry without more, excepting for non-performance of the covenants. Now, my lords, it is clear that the clause does contain a power of re-entry for the non-payment of rent, than which nothing in the world can be more general and unrestricted ; and under words so general, I humbly conceive, that there is in the lease a clause of re-entry on reasonable and usual terms. In a condition of re-entry, all that the law requires is to secure the payment of the rent, and re-entry is, as it were, penal ; and, therefore, the clause in this lease, under the general words of the power, is nothing more than what the law would enforce and require ; and therefore the clause is exactly agreeable to the power, as it is reasonable and usual.

That the real object of the power of re-entry is to secure the payment of rent, is quite obvious ; for a court of equity, acting on reasonable grounds, has *577] always *prevented a re-entry from taking place, if the rent is paid, though the time of re-entry has arrived ; because it was considered merely as a security for the payment of the rent. The maker of it cannot be supposed, in directing the clause of re-entry, to have intended really to destroy the interest given to the lessee, but to secure the repayment of the rent reserved to the reversioner : and now, by the 2d Geo. 2, the legislature has given a sanction to the clause which is used here, and directed the effect of it in general. Surely it is very difficult to imagine it is not a reasonable clause, since the legislature has authorized it in an act of parliament, made expressly for the purpose of assisting landlords, and I apprehend that the clause must be considered as agreeable to a power which requires only a clause of re-entry for non-payment of rents.

I beg here to request your lordships' attention to the observations which I have made on the proceedings of courts of equity, which apply to this head as well as to the former ; for, I conceive that those courts would direct a clause similar to that which is now in question.

Now, my lords, suppose this was a lease by Lady Vernon, it seems to me, that, according to the argument itself used at the bar, there would be very great difficulty in maintaining that the lease was not according to the power, as the

estate moved from her ladyship, and therefore the construction of the power, would be more favourable to the lessee; and if the words were the same, in the lease she might have made, as they are in this lease which Lord Vernon has made, the lease would, I think, be considered as valid; and there can be no different construction of the same words; for the construction, in both cases, must be on the intention ascribed to the parties who used them in the settlement.

My lords, the lessees are purchasers for valuable consideration under the settlement, and, upon the faith *of the power in the settlement, they have paid the value of the estate for the term demised to them, except the small rent and duties. I am persuaded that every court must feel very desirous of supporting the lease executed. The clause objected to is reasonable, and perfectly calculated to secure the rent. It is inserted in all general leases—it is sanctioned by parliament—it is, as I conceive, agreeable to the proceedings in courts of equity, which act on the intention of parties, collected from the instruments executed by them; it is consistent with all the other leases in the family, made under similar powers.

Under these circumstances, I confess, it appears to me, on the best consideration I have been able to give the case, that this lease is warranted by the words of the power in the settlement, and that the lease is valid.

DALLAS, C. J. In answer to the question which your lordships have been pleased to propose to the learned judges, I am of opinion, that the lease in question is bad as not being a good execution of the power.

Two objections arise. The first, as to the fifteen days: the second, to the clause providing as to distress: and the case has been argued at the bar, and considered by the learned judges on the double ground of authority and principle; to each of which I shall separately advert.

And, first, as to the fifteen days. The single case cited is of a negative nature; that is, one in which, though other objections were taken, this was not. And on this case, I think, a great deal too much stress has been put; for, without saying, at present, whether the objection be well or ill founded, good or bad, intrinsically considered, I will only observe, that, when it is seen how it weighs with many learned persons, now, that it is taken, it seems *to me it is going a great way, indeed, to assume, that, if it had been taken formerly, [*579] it could not have succeeded; and, much too far to infer, that, its not having been taken is to be considered as proof, that, by common consent, it was treated as not fit to take. The more natural and rational supposition I should apprehend to be, that it was not adverted to at the time: at least, this is the opinion I should form; for I know not on what legitimate ground of reasoning we can assume, that what appears to be so important now, was considered and rejected then. Still, however, let this case weigh as much as it fairly ought, it is admitted to be but negative authority; and the question now occurring and requiring positive decision, it must be examined and determined on authority, if there be authority; and, if there be no authority, then on principle. Such, then, is the only case relied upon, with respect to the objection applying to the fifteen days.

I come next to the provision as to there being no sufficient distress. And here again, in support of the validity of the lease, one case only has been cited, viz. *Holtley v. Scot*, as bearing directly on the point. On this, I shall not waste time by dwelling longer than, in this last stage of the discussion, I feel to be necessary; and, therefore, as to the imperfection of the report, the character of the reporter as such, the insufficiency and invalidity of the reasoning as reported, and the other grounds of objection made by some of the learned judges, with whom I agree in opinion, to these I shall merely refer, repeating only, for myself, what I said upon a former occasion, and am not disposed on reflection to retract, namely, that, though the particular point now under consideration was not adverted to, then, in the decision reported as it is, still, as it must have been

different, if the objection then and now made had been deemed valid, I think, that, in fairness, I must take it, "such as it is, to be a case adverse to the opinion I entertain. Taking it then as such, and trying it as authority, the only ground to which at present I am addressing my observations, the first objection to it is, that it is a single case, not professing to be grounded on any that had preceded, nor appearing to have been supported by any that had followed it; but, on the contrary, the only similar case, *Coxe v. Day*, standing in opposition to it; for, as such I consider it, and, for reasons which I shall presently give. I need scarcely add, that such a case, dissented from as it now is by so many of the learned judges, admitted to be inconsistent with the decision in *Coxe v. Day*, and, at all events, confessedly at variance with the observations and reasoning of Lord ELLENBOROUGH, throughout the whole of that case, can scarcely, as mere authority, be considered of much avail. In opposition to it, I have said, appears to me to be the case of *Coxe v. Day*. But here, again, I wish to deal correctly with the subject of authority; and though to a certain degree, (and to what degree I shall examine) *Coxe v. Day* must be permitted to operate, still, I think, it is not to be relied on, strictly, as mere authority, even in favour of my view of the subject; first, because if *Holley v. Scot* was rightly decided, *Coxe v. Day* would be in opposition to it, and thus we should only have case against case; and further, that, with respect to *Coxe v. Day*, of the learned judges who now support the judgment of the King's Bench, it is disapproved of by one, as to the grounds on which it stands, and expressly, and in terms dissented from by the other; and, lastly, because being a decision by the same court by which this case was, in the first instance, decided, if to be distinguished, as it is contended it is to be, then it does not apply; if not to be distinguished, nothing of authority can result from two cases decided by the same court in opposition to each other.

*581] *To dispose, therefore, of the whole subject of authority, it appears to me, that, though these cases as cited, have afforded much matter for observation and argument, they furnish nothing like authority, when correctly considered, and in a judicial sense. A word or two, only, before quitting this part of the subject, on what has been much relied on as applied to the objection of the 15 days, namely, the general prevalence of such leases to be taken as evincing, it is said, the sense of the profession, and the mischief that will result from now holding the objection good. I allow to these topics their weight, and much weight undoubtedly belongs to them; but if, when strictly examined, the practice proves to have crept in against principle, and is not pretended to depend upon any positive authority, I can only say, that, being bound to look at the objection, now that it is made, I must decide upon principle; and if principle and practice are at variance, practice must give way; and, in this case, as in others, if the mischief be extensive, the proper remedy, if such there be, must be sought for and applied elsewhere. This, however, at most, confines itself to the objection as to the 15 days; for, with respect to the clause of distress, it is not pretended to have any usage or practice in its favour; and the only decided case is directly the other way. And, with respect to practice, the extension as to the 15 days operating, I admit, in proportion to length of time, and number of leases, becomes, for this very reason, and, in the same proportion, stronger against the clause as to distress, inasmuch as in all such leases no such clause is to be found; and my brother HOLROYD, to whose labour of research and solidity of learning we are all of us, at all times, so much indebted, has informed your lordships, that, on an accurate research, he has not been able to find, in the books of precedents, beyond one instance of such a lease, *582] and that not appearing to be adopted in common use. Practice is, therefore, not only wanting in its favour, but practice is the other way, and in this respect, practice and decision go hand in hand.

I come now to consider the case on principle. And, first, I admit, that, i'

the power is to be deemed indefinite as to time, and, therefore, to be exercised in a reasonable manner, leaving it to the discretion of the party by whom it is to be executed, to decide what is reasonable, it does not appear to me, that the giving 15 days, in the way in which they are given, can be considered as unreasonable. In truth, I deem it quite immaterial to any real interest of the parties, or as to any substantial effect, whether 20s. are to be paid by the one, and received by the other, 15 days sooner or later; and so, I apprehend, the party might have thought, had his attention been drawn to the point. But, when I am told of what the party really intended, as of an independent and substantive intention, collateral to the instrument itself, pre-existent, and having caused the power to be framed precisely as it is, I can only say I take the probability to be, if we could look to the mere matter of fact, that the party himself never entertained a precise intention of any sort on the occasion. The substantial purposes were to be accomplished; the detail of execution was, of course, left to others; and this may account for the difficulty that has arisen. Drawn as the power is, it was probably supposed by professional persons, that the former leases might be looked at, and the clause in question, being found there, was adopted, and I agree, reasonably adopted, if such leases were to govern or might govern; but whether so, or not, is one of the questions in this cause, and which, if decided in the affirmative, would support the lease, as far as this objection goes, though, decided the other way, the case will still depend on the other general *grounds, and the lease may, notwithstanding, be valid. [*583 Fifteen days, therefore, if time might be given, I should consider as not unreasonably given.

In like manner, as to the clause of distress, I see no actual injury as likely to result from it, in this particular case. I agree with several of the learned judges, that it is not likely that 20s. of half-yearly rent would be suffered, if demanded, to remain in arrear; or, if in arrear, that, in the case of leases upon fines, a distress to the value of 20s. would not be found. But this is a way of trying the question, precluded by the very nature of the question itself. The providing for a particular event, not only presupposes the possibility, but even the actual occurrence of such event. It presupposes to provide for it. It anticipates and adapts itself to it.

The question, therefore, arises on what the parties have said and done, not on the reasonableness of doing it, or on the sufficiency or insufficiency, the weight and value, which we are not at liberty to consider; and, therefore, without looking out of the instrument, but to the instrument, and searching in it for the intent to be collected from what is there expressed, if sufficiently expressed: in other words, treating the question as your lordships desire us to treat it, that is, as a question of construction arising on the instrument, such as it is,—what is the legal effect of the lease compared with the power?

And, first, to look to the power, agreeing, as I do, that the intention of the party must govern, as to be collected from the whole instrument. It directs a clause of re-entry for non-payment of rent; and this merely; nothing is said as to time, nothing as to distress; nothing as to reasonable, nothing as to usual; nothing that refers to any former lease or leases in any way whatever, so as to furnish a rule; though reasonable and usual, ancient and accustomed, are terms to be "found as words of reference in several parts of the instrument, directly connecting themselves with former leases and for various objects" [*584 and purposes.

First, then, as to time. That time may be as properly fixed by the occurrence of an event, as by the express specification of time, can scarcely be denied; and when rent is made payable on a particular day, connected with a clause of re-entry for rent not paid, I can only understand not paid on the day when payable. In this there is nothing ambiguous, nothing deficient, nothing to be implied to complete what is expressed. Nor has it been argued, that, if the lease

had been drawn in the very terms of the power, it would not have been a proper execution of the power. But, it is said, in the same instrument, 28 days are given for payment on the leases at rack-rent, being a substantial and heavy rent, before forfeiture can attach for non-payment ; and it is argued,—could the party intend a provision so preposterous and harsh, as that forfeiture should become the immediate consequence of a half-yearly rent of 20*s.* falling into arrear ? To which, I answer, that this suggestion of harshness appears to me to be imagination, and nothing more ; for what of real harshness is there in making an estate liable to forfeiture upon non-payment of a sum so small, as, from its very smallness, not to require time to be given to pay it ? Fifteen days were scarcely necessary to put a party into condition to pay 20*s.* ! And further, why the party to receive could not judge if time were to be given as to the 15 days, as well as to the twenty-eight, I am altogether at a loss to conceive. If at liberty, therefore, to conjecture as to intent, independent of the words made use of, my conjecture would be, that the party himself meant nothing as to the 15 days, beyond what he has said : that he meant only what he has said ; and still less, if possible. Can I suppose, that he actually *meant time to be given, intentionally avoiding to decide what that time should be ; and this, merely to leave it open to the discretion of another to decide for him, what he could just as well have decided for himself ? In the particular case, time may be of no moment any way ; but, as applying to future cases, and involving principles applicable to the construction of all instruments, it becomes of real magnitude and importance. It is not in the operation of the clause, as it applies to the lease, treated as a valid lease, that any difficulty arises, but in the application of the lease to the power, with a view to the validity of the lease.

But I go further, and will suppose the question to be, whether the power should not be so construed as to imply a reasonable discretion to have been intended as to time. In such event, it has been asked, who is to construe, what would be reasonable time ? Now passing by all the difficulties that may arise in this respect, I am willing to answer—the competent tribunal according to the nature of the case. But which, according to the case, is the competent tribunal ? This becomes a question. On the trial of this ejectment, was it the jury or the judge ? and though, in the result, which of the two might be ascertained, yet the result could only be got at through, as now, a doubtful controversy ; and this uncertainty as to tribunal, with the additional uncertainty as to result, that result depending on the uncertainty of opinion, which may be different with different men, and of which these proceedings have, in every stage, afforded ample proof, and, this day in particular, a striking instance, are all inconveniences introduced by holding the power to be indefinite, and would have been avoided by framing the lease in the words of the power. One way, it would be certain ; the other opens, at least, to question ; and it is this substitution of uncertainty for certainty, this rule of discretion, which throws open the *gate to litigation, that would otherwise be closed and fastened against it, that constitutes my fundamental objection, so to understand and so to construe this power. If, therefore, the question be, whether reasonable or not should be complied, I should hold, that it ought not to be implied, even if we were at liberty to imply it, framed as the power is.

I come, now, to the second objection ; and though, in one light, it is the most material, yet it will not be necessary in this late stage of the proceedings to discuss it at any length ; I mean, restraining the right to re-enter to there being no sufficient distress to be found on the premises. And, with respect to this, all I have hitherto said as to time applies with increase of force. It is a further clog, not warranted by the original power ; and it is one which, as to possible injury, does not rest in speculation merely. The case so often referred to in the Exchequer forms a practical comment. When resorted to as a remedy, it shows the wrong which may result. The lessor of the plaintiff failed, because some

obscure corner of the premises had not been searched. That case is this; and, in a similar proceeding, the effect would have been or would be the same. To the validity of this objection, *Coxe v. Day* is in point. It is so, I conceive, in the decision; it is so beyond all doubt, as I apprehend, from what is said by Lord ELLENBOROUGH throughout the whole case. Whether to be fairly distinguished or not, in any respect, I have already examined, and will not repeat. The argument drawn from the statute, and the general nature of such a clause considered as a mere security for rent, was brought forward then, as now; but was mentioned only to be overruled; the point not appearing to the court to be sufficiently tenable to admit of discussion.

To one or two other points, I shall now barely advert. I can scarcely think that the question can be reduced to "one of mere verbal consideration." But, if so, I cannot myself feel the difference between "on" and "for;" [^{*587} "for non-payment of rent,"] I consider to be equivalent to "on non-payment of rent;" though I have no hesitation in admitting, that "on" and "for" may be sometimes different, and sometimes synonymous, and this depending on the context and the subject-matter. But, looking at the subject-matter, and, taking the whole of this instrument into consideration, I think there is no reason for distinguishing on the present occasion. In like manner, as to the term "beneficial," I conceive it to refer to the lessor or the remainder-man, and not to the lessee; and, so understood, if there be any weight in the observations I have hitherto made, such a reservation would be less beneficial to the lessor than the direct clause, unclogged with any conditions as to time or distress. Taking, further, the words of the power to apply to former reservations, and that, with this view, former leases might be looked at, it seems to me, the argument turns the other way. The power directs, that there be reserved the ancient and accustomed rents, or as great or beneficial rents, duties, and services, thereby letting in, I admit, the former leases as evidence of what rent was ancient and accustomed; and so, as to duties and services; but following up these general words with special and particular words, showing the powers were not intended to include the clause as to re-entry, particular words specially providing for this right, and in terms directing how it shall be reserved: and, having mentioned former leases as admissible in these respects, I will only further say, I think they were not admissible, except for the purposes as to which they expressly, or by necessary implication, refer. This is, indeed, a necessary consequence of all I have already said; and without, therefore, going at large into the wide field which the argument in this respect has occupied, but referring generally to the opinions and reasoning of those who think as I do, I [^{*588} will merely state the broad ground of my opinion, which is, that there being no ambiguity of any kind, nor any words of reference to any other as former leases as connected with this subject, nor any generality of expression, so as to let in extrinsic evidence to restrain or qualify, or to exclude, but a clear, specific, and definite sense and meaning, such evidence is not admissible. This conclusion, it will be admitted, must follow, if the premises are well founded, but whether so or not depends, as far as my opinion goes, on the validity of the general grounds on which that opinion rests, and of which it is for your lordships to judge.

ABBOTT, C. J. I am of opinion, that the demise of the 5th September, 1803, is not invalid.

The objection, upon which it is now sought to avoid the lease, is, that the clause of re-entry for non-payment of the rent is not such as is required by the settlement: and this for two reasons. First, because it allows to the tenant fifteen days for payment beyond the days mentioned in the lease; and, secondly, because it is restricted to instances, wherein no sufficient distress or distresses can or may be had or taken upon the premises whereby the same, and all arrearages thereof, if any be, may be fully raised, levied, and paid.

This objection is *strictissimi juris*, and, as such, is by no means to be favoured ; though, if the *strictissimum jus* be found upon due consideration to be with the objector, a court of law is bound to yield to his objection. As I have already intimated, I think the right is not with the objector.

In the course of the argument at your lordships' bar, your lordships' attention was called to a supposed distinction in the construction of powers, between such as *are created by the owner of the inheritance limiting a partial estate to himself, and to be exercised by himself as owner of such partial estate, and such as are created by the owner of the inheritance, to be exercised by a stranger, to whom he may have limited a partial estate, or to whom he may have given the power as a naked power, unconnected with any estate in the land. Such a distinction appears inapplicable to the present case ; because the owner of the inheritance has, here, limited a partial estate, first, to a stranger, and, secondly, to herself ; and the words of the power must have the same meaning, whether the question had arisen upon an execution thereof by the stranger, or by herself.

It was also argued, that the power of leasing being for the benefit of the tenant for life, the qualifications and restrictions imposed upon the exercise of the power are for the benefit of the remainder-man ; and, therefore, that the clauses of qualification and restriction are to be construed most beneficially for the latter. This point, also, appears to have little weight in the present case ; because, adverting to the amount of the fine paid upon the surrender of an existing lease, and to the amount of the rent reserved, I think, it cannot be supposed, that the purchaser of the present lease would have given one farthing less, if the clause of re-entry had been strictly confined to non-payment of the rent at the very day ; or, that the estate of the remainder-man would now be worth one farthing more, if the lease in question had contained a clause to that effect, instead of the clause upon which these objections have arisen.

And, being of opinion, that the tenant for life could derive no benefit, and that the remainder-man sustains no prejudice as to the value of his interest, from the form in which the clause of re-entry is found in this lease, I think, a court of law may reasonably regard the interest of the tenant, *the purchaser of the lease*, and *put such a reasonable and liberal construction upon the words of the power in the settlement as will give effect to the lease, rather than yield to critical forms and subtil objections adduced for the purpose of defeating it. And this becomes the more important, if it be true, as has been suggested, that very many leases are in existence containing clauses similar to the present, and demised from powers expressed in language similar to that of the power from which this lease was derived. Considerations of this nature, certainly, ought not to control or vary the sense of plain and unambiguous words ; but they may be reasonably entertained for the construction of words of doubtful import ; not merely by reason of the consequences of a decision in a particular case affecting numerous other cases of the like nature ; but because the fact suggested is evidence of the general opinion entertained by professional men upon the meaning of the words of a legal instrument.

These words, in the present case, are "a power of re-entry for non-payment of the rent to be thereby reserved." And the first question is, whether these words may be understood to mean a reasonable power, or must be confined to a power which the landlord may exercise, if the rent be not paid at the very day, and without regard to any property to be found on the demised premises, upon which he may levy his rent, and, thereby, compensate himself, at his tenant's expense, for his tenant's neglect.

If the words may be understood to mean a reasonable power, the only remaining question will be, whether the power of re-entry contained in this lease be a reasonable power. I shall proceed, in the first place, to show, that, in my opinion, the words in question may be understood to mean a reasonable

power. Non-payment is a mere neglect or default, and, if the words, "a power of re-entry for non-payment of the rent," are to be taken strictly and *ad literam*, they will import a power *of re-entry for the mere neglect or default of the tenant: but this cannot possibly be their legal import or effect, because, by the common law of England, a landlord never could enter for the mere neglect or default of his tenant in this respect, under any power or clause in whatsoever language expressed. Some act is always required to be done by the landlord, in order to entitle himself to exercise his power, and this is required to prevent the tenant from being surprised or injured. This act, at the common law, was an actual demand of the rent on the part of the landlord. And the common law required this demand to be in a most precise and peculiar manner. It was to be made just at the close of the last day of payment (allowing the tenant the whole day to prepare his money) at the time when so much daylight remained as might be sufficient to view and count the money, and no more. It was to be made at the door of the demised messuage, if any on the premises, and, if none, then at such usual and notorious place of resort where the tenant might reasonably be expected to be found, if he was not altogether absent; and it was to be of the precise sum then accruing due, not including any former arrears, all of which, although due and recoverable by distress or action, were considered as waived by the landlord on a question of forfeiture by his prior neglect to demand or enter for them.

Then, if the words of the power, or, rather, of the qualification of the power, contained in the settlement, cannot receive a literal construction, and be held to apply to a case of neglect or default, only according to their literal purport, they must receive some other and different construction, which must, in my opinion, be a reasonable construction, and a construction properly suited to the object and purpose in view; that is, to secure and enforce the payment of the rent, so that, on *the one hand, the tenant may not hold the land without payment, to the prejudice of the landlord, nor, on the other hand, be dispossessed of it, if either himself or the land, which is emphatically said to be debtor for rent, presents payment or the means of payment without unreasonable delay or prejudice to the landlord.

It has been objected, however, that, if the literal or strict meaning of the words be not adopted, no other meaning can be, because, as it was said, courts of law cannot say what is a reasonable power or clause of re-entry. But, I conceive, that in this, as in all other cases, courts of law can find out what is reasonable, and that, in some cases, they are absolutely required to do so. In many cases of a general nature, or prevailing usage, the judges may be able to decide the point of themselves; in others, which may depend upon particular facts and circumstances, the assistance of a jury may be requisite, and, wherever such assistance is requisite, there are ready modes of obtaining it. I will mention one instance, in which courts of law are required by the legislature to discover and decide, if the point be legislated, a question upon the reasonable execution of a power. By the general enclosure act, 41 Geo. 3, c. 109, s. 38 a rector or vicar is enabled to lease his allotment under certain restrictions mentioned in the act, and, among others, so that there be inserted in the lease, "power of re-entry on non-payment of the rent or rents to be thereby reserved within a reasonable time to be therein limited after the same shall become due." A lease of such an allotment must, therefore provide, that if the rent be unpaid for some specified number of days or weeks after the day of reservation, the rector or vicar may re-enter; and, if any question should arise, whether the number of days specified in a particular lease, be or *be not a reasonable time, the courts of law must necessarily find some mode of deciding the question.

For these reasons, my lords, I am of opinion, that the words of the clause in question may, and ought to be understood to mean a reasonable power of re-

entry. And, taking this to be the legitimate meaning of the words, I proceed to show, that, in my opinion, the power of re-entry, contained in the particular instance of the lease in question, is a reasonable power. Usage is of great weight in considering what is reasonable; and it cannot be denied, that the power of re-entry, as expressed in this lease, is, in form and substance, such as was frequently found in leases before the execution of the settlement by Louisa Barbara Mansel, which was in 1757. This is a fact which must be in the knowledge of some of your lordships, without recurring to the special verdict for information as to the leases of this particular estate. If any space of time could be allowed beyond the days of payment prescribed in the reservation, the space of 15 days, which is the period allowed in the present lease, will not, I am persuaded, be thought an unreasonable space of time. Indeed, although this objection was pointed out, it was not so much insisted upon at your lordships' bar, nor could be in the construction of a settlement allowing 28 days for payment in leases to be made at a rack-rent. The main stress of the argument was applied to that part of the clause in the lease, which narrows the power of re-entry to cases wherein no sufficient distress can or may be had and taken upon the premises, whereby the rents and services, and all arrearages thereof, may be fully raised, levied, and paid.

Upon this part of the argument, the case of *Coxe v. Day*, 13 East, 118, was quoted and relied upon. It has, however, *been discovered, that the decision in that case is contrary to a prior decision of the Court of King's Bench in a case of *Holley v. Scot*, reported in Loft, and of which a more correct manuscript note was also cited. This earlier case was unknown to the counsel by whom *Coxe v. Day* was argued, and probably to the court also; so that the decision of *Coxe v. Day* is not wholly free from question as to its own particular circumstances. It was certainly not thought applicable to the present case by the two surviving judges of the court, when the present case was before them; and it is distinguishable from this by the difference of the language of the clause upon which it arose. For, in that case, the words of the clause were not general, as in the present, "a power of re-entry for non-payment of the rent," but special, "a power of re-entry, if the rent be behind for the space of 21 days," which words do not so easily admit the introduction of any other qualification or matter as the general words of the present clause: so that, upon the whole, the case of *Coxe v. Day* does not appear to contain a decision precisely in point to the present case. And, therefore, in respect of authority, the question still appears to be left open,—whether, in the absence of any words denoting a contrary intention in the mind of the framer of the clause, a restriction of the right, or power of re-entry to the absence of a sufficient distress be a reasonable restriction in a lease like the present; for, if it be, then a right or power so restrained is a reasonable right or power of re-entry, and the introduction of such a right or power into the present lease, is a good execution of the leasing power contained in the settlement.

Such a restriction of the right had prevailed in practice before the execution of this settlement in 1757. It was known and in use, though probably less general or *frequent, before passing the statute 4 Geo. 2, c. 28, s. 2, in 1731. If the effect of that statute be (as at least one very learned person has thought) to alter entirely the common law, and to take away the right of re-entry under any circumstances of demand and refusal of the rent, where a sufficient distress can be found, then, certainly, the express introduction of the words of restriction cannot invalidate the lease, because it is only an expression of a matter tacitly contained and implied by operation of law. But, supposing the statute not to have this effect, still, in my opinion, the restriction is reasonable in itself in a case like the present. The instances of proceeding at the common law by demand of the rent since the statute was passed are very few; the proceeding is in itself troublesome and difficult, as will appear

by the circumstances required, which I have already mentioned : it was, indeed, so troublesome and difficult, and found to be attended with so little benefit to landlords, that the statute was passed for their relief, substituting the absence of distress in the place of demand. Can it, then, be said that the reversioner is unreasonably restrained or prejudiced by the introduction of a matter which the legislature has thought generally beneficial to landlords, and which, in all probability, he himself would have adopted, even if the terms of the lease had been such as to have allowed him to act otherwise ? I say, that, in all probability, he would have adopted it, because, I presume, his only wish, like that of every other reasonable person, must be to obtain the payment of his rent in the most easy and speedy manner. And whatever difficulty there may be in viewing a messuage or farm, so as to ascertain whether sufficient be found upon it to answer the arrears of a rent bearing, as in this case, a very small proportion to the annual value of the tenement, still I have the authority of the legislature, and of the experience upon which the statute was founded, [^{*596} for saying, that this difficulty is less in practice than the difficulty of making such a demand as would authorize a re-entry at the common law. If any thing more be desired by the reversioner than a speedy and easy mode of securing and enforcing the payment of the reserved rent, I should say, that he desires more than the framer of the settlement intended to give, and more than the law ought reasonably to allow. The power of re-entry, in whatever words it be expressed, can be exercised only in one of two modes ; that is, either by making a demand at the common law, without regarding the value of distrainable goods on the premises, or by ascertaining that no sufficient goods are to be found on the premises, without regarding a demand of payment. For the reasons already given, I think the latter must be considered as the most effectual and beneficial mode ; and, therefore, speaking generally of cases of this nature, I can discover no reason for resorting to the former, except a hope (certainly not entertained in this particular case,) that the tenant, being taken by surprise, and not expecting a demand, may not be prepared for immediate payment in money, and a desire to take advantage of his want of preparation, and deprive him of the residue of his term, or harass him with a law-suit. To such a motive a court of law will never lend its aid. And a construction calculated to give effect to such a motive would be contrary to the general principles of the law. And it ought not to be omitted, that the present question arises upon the construction of that part of a leasing power which is intended to create a forfeiture of the lease executed under the power. It is said in our books, that forfeitures are odious in the law, and this is the reason assigned for requiring so much formality and precision in the demand of the rent at the common law. And, ^{*for the same reason,} in addition to all others with which I have troubled your lordships, I think such a construction ought to be put [^{*597} upon the words of the settlement as will tend rather to the exclusion than to the introduction of forfeitures of the leases to be granted under it.

For these reasons, I am of opinion, that the demise of the 5th September, 1803, is not invalid.

The LORD CHANCELLOR (a) My lords, the question which is now brought before your lordships for decision, is undoubtedly a question of very great importance to the parties. We have to determine, as I understand, upon the validity of a particular lease, which is stated in the special verdict. The decision upon that lease, however, will not only give validity or invalidity to the lease in question, but as we have been informed by the bar, to the leases of a very considerable mass of property. The plaintiff, therefore, has a great interest in your lordships' decision ; the tenants, of course, have a very considerable interest in your lordships' decision ; but the interest in your decision is not confined to the landlord and the tenants, because, I apprehend, that, if these leases are in-

(a) Lord Eldon.

valid, the tenants in this case, probably, as in a case from another part of the united kingdom (I mean the case of the Queensberry leases) will have a title to recover against the assets of the deceased lessor, the value of their interests in the estate. But, however great the interest of any of these parties may be, it is most for the public interest that your lordships should take care to decide rightly.

My lords, if I could hope, that, by asking your lordships for further time, I could alter that opinion which, it is my duty to inform your lordships, I have *598] "long entertained upon the question now before you, (and the rather my duty, because, if it should appear to you to be hastily formed, it will deserve the less attention,) or if I could, consistently with my other important engagements and duties, hope to find time, in which I could lay down the humble statements I am now about to make with more method, or if I could hope to relieve myself from the pain, which I do most sincerely feel, in maintaining an opinion upon this subject, different from that which has been expressed by many persons, for whose learning and abilities I entertain the greatest respect, I should endeavour to press your lordships to delay hearing what I have humbly to offer to your lordships' attention.

My lords, I must confess, that the habits of my professional life led me at first to entertain a very considerable surprise indeed, how, upon some of the questions agitated in this house, there could be any difference of opinion anywhere. My lords, with respect to the authorities, your lordships have heard observations which are perhaps much more apt than I could presume to offer to your attention, upon the conflicting cases of *Hotley v. Scot*, and *Coxe v. Day*, and the negative authority of the case before Lord Chief Justice WILLES, who, I believe, was a very great lawyer. Those authorities I shall not, I hope, be thought to treat with any disrespect, which certainly I do not mean, when I avail myself of what has fallen from the two learned chief justices in their observations on *Coxe v. Day*. If *Coxe v. Day* is an authority one way, *Hotley v. Scot* is an authority the other way; and the judgment of two of the judges in the court below on this very case, conflicts with the case of *Coxe v. Day*. But, my lords, such have been the habits of my professional life, that I cannot possibly think that we have considered all the authority to be taken into consideration upon this *subject. My lords, we hear of the practice of *599] conveyancers, and that amounts to a very considerable authority; and I am justified in that assertion by the opinions of the greatest men who have sat in Westminster Hall, who, I am persuaded, in many instances, if matters had been *res integræ*, would have pronounced decisions very different from those which they thought proper to adopt, if they had not taken notice of the practice of conveyancers as authority; but, upon this subject, my lords, I do not think that the unwritten authorities are fairly considered, when it is merely put, that such clearly is the practice of conveyancers; and I would take the liberty with great respect (with respect too, more sincere than I really know how to express) to intimate an opinion that, upon cases of this nature, it might not be much amiss, if courts of *law* would inquire a little more what has been done as well as said in courts of *equity*: not for the purpose of determining differently what are the points, but of determining how far men, who have sat in the courts of *equity*, have determined the legal point before they have applied themselves to those directions, and decrees, and orders, which they are daily in the habit of pronouncing. My lords, between the year 1772, (it is a long while to look back to,) and a period approaching the year 1780, I spent many of the most profitable years of my life in the office of a conveyancer; and I was led, at that time, to a knowledge, not only of the practice there, but of what were the sentiments of the great conveyancers of those days; and I am as sure, I think, as I can be of my existence, that it never would have occurred to any one of them, if there was a leasing power in any marriage settlement,

requiring such a power as this, that to give the time of fifteen or twenty days would be an invalid execution of the power. I am sure all practice was the other way; and practice, my lords, in this respect is evidence of what is reasonable. *But the unwritten authority does not rest here. The power [*600 of leasing is often one which must be executed by trustees under marriage settlements. In those settlements in which they take the legal fee, it of course falls on them; and in those in which the legal estate is in the persons beneficially interested, the power of leasing is often given to the trustees to preserve contingent remainders during the minorities of the *cestuique* uses. In a great majority of cases, I can say, on my own knowledge, that the power does not mention any period of arrear before the re-entry is to be allowed. The trustees sometimes use their own discretion in executing the power to lease; at other times they act under the direction of the Court of Chancery. In the first case, their uniform practice would form a weighty consideration here. In the second, where they act by the authority of the Court of Chancery, you must permit me, for my predecessors and successors, though not for myself, to say, in every one of those leases there is an authority of law, that that is a due execution of the power: because the chancellor has no right to direct such a lease to be made, if, when it is executed, it is not according to the power. He is a judge of law and equity, and, when he has determined as a judge of law that such is a due execution of the power, then, and then only, he has authority, according to the constitution of this country, to direct such lease to be made by the trustees. Then, my lords, I should be very glad to know, whether the whole practice of that court is not to be looked at as practice fixing what is the legal construction of such a power to lease?

My lords, it does not rest here; for, suppose the case put by one learned judge, suppose the tenant for life, here, had agreed with this occupying tenant to make him a lease with a power of re-entry on non-payment of rent, and he would not make it with a power of re-entry giving an extension of [*601 time, and then the tenant had filed a bill in equity to compel him to make a lease according to the agreement:—No chancellor could possibly have directed a lease to be made with fifteen days' time, in case of a non-payment of rent, unless he was satisfied, according to law, that would be a due execution of the power; he could not have done it in any of the cases in which there has been such a decree made. I disclaim, for those who have gone before me, and those who are to come after me, the charge that such directions were not made upon the authority of cases which have, at least, as much authority, and a great deal more than those which have been stated to your lordships.

Another authority is to be found in the construction which the general inclosure act has received. Rectors and vicars are, under the 38th section of that act, enabled to lease their allotments, so that there be inserted in such lease power of re-entry, on non-payment of rent, within a reasonable time, to be therein limited, after the same shall become due. And, my lords, we have acted under that statute ever since it passed; rectors and vicars have been making leases ever since, and I believe you will find, that the universal practice has been to give days in the manner days are given in this lease. It is truly said, that a *reasonable* time is authorized; but, if my argument is correct, a reasonable time would have been authorized, if these words had not been introduced; and, I must add, that the words of the act answer the objection, that courts of justice cannot be required to say what is a reasonable time; for, the legislature has, in this instance, expressly required them to do so. Suppose that, in a parish in which the rector or vicar has an allotment subject to this power, there are tenants for life, receiving allotments to be enjoyed according to the limitations of the *settlement of that land, in respect of which the allotment is made,—What is the consequence of that? The consequence of that is, that the powers of leasing in the settlements under which

those respective persons (lay persons, not ecclesiastical persons) are made tenants for life, apply themselves to their whole estate after the allotment is made; and a most singular thing it would be to say, that fourteen or fifteen days is a reasonable time for a power of re-entry in a rector or vicar, but unreasonable in the tenant for life claiming under a settlement, which settlement so far as it applies to the new allotment, is in fact made under that very act of enclosure. I say, therefore, my lords, that your lordships' decision in favour of the defendant in error, if not founded in peculiarities in the words of the settlement, would interfere with practice so long and so general as to make it one of the most mischievous that ever was pronounced.

I will now, therefore, consider whether any peculiarities justifying such a decision, can be found in the settlement itself; and, here, permit me to say, that I am going to comment upon this settlement, taking it for granted that it is understood on all sides, that this special verdict finds every thing that ought to be found. I put that upon the understanding of the parties. My lords, we have had, in the course of argument at the bar, a great deal of argument on the admissibility of extrinsic evidence. Now, with reference to extrinsic evidence, my humble opinion is, that this is a case in which you must admit some extrinsic evidence; although I concede that, generally speaking, you must construe instruments by what is to be found within their four corners. That principle cannot apply here; for, when you are considering the question, whether a lease is conformable to a power in another instrument, you must look into [that instrument which contains the power; *and, if you must look into *603] that instrument which contains the power, then, in order to get at the true construction of the power itself, you must look at every part of that instrument; and, if the instrument which contains the power be referred to by the instrument which is the execution of the power; and the instrument which contains the power, also refers you to other instruments for its explanation, then you must look at those instruments, and by this chain they become part of the documents on which your decision, as to the execution of the power, must be founded.

I think, in this case, you might state it thus. Here were leases made prior to 1757; the settlement refers to leases which should be existing at the time the new lease should be made, and it not only refers to the leases which should be then existing, but it refers, in that part of it which gives the power of making future leases, to the leases existing at the time of the settlement. I do not carry it so far as to say you shall go into length of time to see what were the habits of leasing prior to those then existing leases; but, I say, you must go to those then existing leases, or it is impossible to collect what the meaning of that power is. Now, my lords, I say, also, that, if the instrument in which the power is contained, shows what was the nature of the estates which the persons had who were making that settlement, you cannot shut your eyes against that part of the settlement in which that information is contained.

With these general observations, your lordships will give me leave to call your attention to the facts of the case. A lady named Louisa Barbara Mansel, afterwards Louisa Barbara Vernon, was tenant for life of the estates, with several remainders over, and with a power in her, in consideration of marriage, of revocation and new appointment; and the special verdict states, that, upon the *604] 20th of July, 1757, she intermarried with Mr. *Vernon; that, before the marriage upon the 2d of July, 1757, she, by her deed, revoked all the uses contained in the will of Lord Mansel, concerning the said premises, and appointed and limited the same to the Earl of Guilford and Charles Montagu, and their heirs, in trust to hold the same, after the said marriage, to the use of the said George Venables Vernon for life, without impeachment of waste, remainder to the said Louisa Barbara for life, without impeachment of waste, and after the determination of those estates, or either of them by forfeiture or

otherwise, in the lifetime of the said George Venables Vernon and Louisa Barbara, or the survivor of them, to the use of the said Earl of Guilford and Charles Montagu, and their heirs, to preserve contingent remainders, and to permit the said George, during his life, and afterwards the said Louisa Barbara, during her life, to take the rents, &c., and after the decease of the survivor of them, to divers other uses for the benefit of their issue; and, in default of issue, to the use of the will of the said Louisa Barbara, and subject to the powers and limitations to be thereby directed and appointed; and, in the mean time, to the use of the said Louisa Barbara, her heirs and assigns for ever; and then follows the clause upon which this question principally arises. My lords, before I state that, I will take the liberty to mention to your lordships another head of authority which I confess has influenced me a good deal with respect to those fifteen days. Your lordships know, that, by a statute made some years ago, the legislature authorized the committees of lunatics, by authority of the court of chancery, where those lunatics were tenants for life with powers of leasing, to make such leases as the tenants could have made if they had been of sane mind; and I never had the least doubt, in consequence of the habits of my professional life, in directing them to make leases with this ordinary reservation of fourteen *or fifteen days with respect to the time of forfeiting [*805 the estate. I certainly did, however, think it right, in deference to the opinion which I understood was stated in the Exchequer Chamber, to check myself in that practice, and to take care that that habit should no longer be acted on. So if a rector or vicar who had an allotment under an enclosure act had been a lunatic, it would have been necessary for the court to have acted, and I should have given a similar direction.

My lords, then follows the clause containing the leasing power. But before I read this clause, I apprehend, that, where a power of this sort is given in a marriage settlement, it is part of the contract which all the parties in the marriage settlement are understood to enter into with respect to each other. It is their intention that is to be executed, and the tenant for life, when he makes a lease, acts according to that intention, as an instrument for the benefit of all those who have an interest in the inheritance. He must, therefore, be considered as acting with perfect *bona fides*, and, in cases of forfeiture, you are not to be astute to find out a forfeiture, if the parties really are dealing *bona fide*, according to what they conceive to be the intention of the framers of the settlement under which they act. If they misconceive it, that will not do; but if a fair construction will authorize you to say, they have not misconceived it, you are not to look astutely to defeat their execution. There were three species of estates of which leases were to be made under this settlement; one of them estates, as I understand, usually demised for lives, upon payment of a fine which fine is, in truth, a great portion of the consideration paid for such leases, and the small annual rents and other services, though of some value, are of little value when compared to the fine; they are a sort of rental, which is rather from time to time calculating a small sum of *money off the estate, than paying the value of the estate. The next species of lands are lands to [*806 be let at rack-rent for years absolute; and, with reference to them, it is very easy to reserve a power of re-entry; and the third is of mines; with regard to which, unless conveyances are more able at this time of the day than some of the old ones used to be in the last century, it would be difficult to find out what sort of power of re-entry you could apply to them. Conveyancers are, therefore, in general, obliged to content themselves with alluding to proper and reasonable modes of working the mines. Then, one of the conditions to which we are particularly to attend is this, "And so as on every such respective lease, demise, or grant, for a life or lives, or for years determinable on the dropping of a life or lives, there be reserved and made payable, during the continuance of the estates and interest thereby to be demised, leased, or granted respectively,

the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial yearly rents, duties, and services, or more, as now are, or at the time of demising or granting the premises so to be demised, leased, or granted respectively, were reserved or made payable for or in respect of the same premises respectively ; or a just proportion of such ancient or the present reserved rents, duties, and services, or more, according to the value of the premises so to be demised, leased, or granted respectively ;" and then come the exceptions with respect to the heriots, and the usual clause, that these rents, duties, and services were to be for the benefit of the persons entitled from time to time. Now let us suppose ourselves sitting down to make a new lease, after the year 1757, of premises which, in the year 1757, was held under a then existing lease. Addressing ourselves to the execution of that power, is it possible to be denied, *607] that, in order to see how the power should *be executed, we must look at that existing lease which is the lease immediately preceding that which we are to make ? I do not carry it further ; I do not say that we are to go back into the more remote periods of time, and see what was the habit in all time past : but, I say, we are bound to receive the evidence to which the language of the power refers us ; to receive the evidence of the deed containing the power. You must first ask, do you mean to demise according to the ancient and accustomed rent ? You must go there to know what it is ; and so as to the duties and services. Here are strong words here which always struck me, that it is not necessary they should be the same yearly rents, duties, and services, or more, but they may be as great *or* beneficial. I say I have a right to look at this word "*or*" as being of some signification, when I find, in other parts of the lease, as "*great and* beneficial." This is to be "*as great or* beneficial ;" and I cannot help expressing, that I entertain very considerable doubt whether, if this clause *as to the distress* had not been contained in the new lease, the new lease for that reason would not have been bad. I agree with the lord chief justice, that if the lease be in the slightest degree less beneficial than the requisitions of the power, it is invalid. But, if this power authorizes me to make a lease, provided the rent is as beneficial, if I demise upon the same rent in the same way, do not I reserve you as beneficial a rent as formerly ?

Then, my lords, come these words, and let us suppose that they are necessary, "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." And this occurs in an instrument where, with respect to other property, upon which the best and most improved yearly rent was to be reserved, and where, with respect to that rent which was to be so reserved, (a rent which *was *de anno in annum*, and *608] from half year to half year, rendering to the landlord the value of the enjoyment,) the authors of this settlement say, that there shall be non-payment allowed for twenty-eight days. I take it, now, upon the first objection as to the fifteen days ; and I ask, whether a power of re-entry for non-payment of rent in fifteen days is not a power of re-entry for non-payment of rent ? No man can deny that it is a power of re-entry ; no man can deny that it is a power of re-entry for non-payment of rent. It is not the same power as it would be, if it were twenty days or twenty-five days ; but still it is a power of re-entry for non-payment of rent : and where are the words in the settlement on which the parties insist there shall be in the lease an unconditional power of re-entry for non-payment of rent ? Now, to recur again to the impression that old habits make on one's mind, it would appear to me most astonishing,—previous to the agitation of this case, it did appear one of the most astonishing things to my mind,—having a good deal to do with decisions at law, that, if there was a lease to be made with a power of re-entry, the lessor could insist it should be a lease giving a power of re-entry at the day. I should say that was contrary to the habit and usage of the court ;—speaking from that habit and usage, I say, the court ought to decree in favour of the tenant, if he were willing to execute a

lease containing a reasonable extension of time for the payment of the rent; and I cannot help thinking that, from the circumstance of pointing out the twenty-eight days in the other case, you are bound to see a difference between the case of a reservation of a rent, which is the actual value from year to year, of the land that is occupied, (as far as a tenant ever pays the actual value,) and the reservation of a rent of much less value, but compensated by a large fine: and when you consider the value of the lands *and the estate, as compared with the fine, it does appear to me, that this deed affords sufficient evidence, (particularly with reference to the words I have before commented on,) that, if the rent and fine are as beneficial as those in the then existing lease, it would be a due execution of the power.

But that does not touch the question about distress, I admit; unless so far as the same qualification of distress may have been in the former lease; because, if the same qualification of distress was in the former lease, then the same arguments that you build on, giving the period in the former lease, apply to giving the distress. But, if the power of re-entry required by the settlement means a reasonable power of re-entry, and if that has been the construction usually put on it, it is the same as if the lease was directly conformable to the power. I think that practice *has* applied that qualification to the reservation of a general power of re-entry; and, as to the difficulty of determining what is reasonable, I know no difference between determining what is reasonable on this subject and on any other subjects; and on other subjects every court has to determine it. With respect to the qualification of the power for re-entry by the sufficiency of distress, though I cannot agree with the learned judge, who I think is as old a sage of the law as myself, (I believe he came to the bar in the same term with me,) that the statute of 4 Geo. 2 is imperative, yet it is impossible for me to deny, that the statute of 4 Geo. 2 and the general enclosure act, and all the practice to which I have been alluding, do establish, beyond all question, that it is a reasonable execution of a power, even where this clause of distress is put in. And, my lords, when we are considering these circumstances, do let us attend a little to the extreme importance of the question before us in one respect. My lords, you are not merely in the *execution of a power to consider what is most beneficial, as between A. the tenant for life, and B. the remainder-man; but what is most beneficial to both and to each, with reference to the terms on which tenants are to be procured: and though, in this case, there is very little difference, perhaps, of convenience or inconvenience to the tenant, whether he is to pay on the day the rent is reserved, or fifteen days afterwards, yet, on the one hand, if there be that little inconvenience, I say that is a ground why, if the words of the power contained in the settlement will allow you to give those days, you shall not say that is a forfeiture of the lease; and, on the other hand, I say, though the *quantum* of convenience may be ever so small, yet that the principle pursued in deciding these cases, requires you to consider, not merely what is for the benefit of a person having an interest in one part of the inheritance, but what is for the benefit of the whole inheritance, and all the persons to take in it.

There is another way of putting it which is material; that is, if I am not wrong in my notions of the practice, to consider, if powers are to be executed for the benefit of all persons having an interest in the inheritance, in the first place, what will be the situation of persons who have those powers? That is a most serious consideration. If you are to adopt it as a principle, that, in a settlement where a power is given as nakedly in the terms of it as here, you are to execute that power in the precise terms, (and then you must take into your consideration, that no tenant for life, no trustee, nobody, in short, who has not an absolute inheritance in the estate, will ever think of executing a power without the direction of a court to tell him whether it is right or wrong,) the inconvenience would be infinitely great. But I am of opinion, that these words

*611] of qualification are words of course ; (and I beg leave to recall the *attention of your lordships to the language of Mr. Justice BAYLEY on this part of the case,) that this is an entry for non-payment of rent ; and that the words of the settlement do not prohibit such a clause for re-entry for non-payment of rent as is here reserved ; I think, we have the authority of the legislature for saying, that the qualifications in this power are reasonable ; and, therefore, on these grounds, I shall only offer my opinion, that these leases are valid. Whether your lordships may think proper to adopt that opinion, it is not for me to say ; it is my duty to express that opinion.

Lord REDESDALE.—My lords, I shall not trouble your lordships at any length upon the question now before you ; but, having attended throughout the discussion of it, and having, from a very early period of life, had much converse with that part of the law which enables me more particularly to consider cases of this description, I mean conveyancing, (I think it my duty to offer a few words to your lordships' consideration.

My lords, with respect to what has been said as to general opinions upon the subject, and as to the practice of conveyancing, I cannot agree with much that has dropped ; because I do conceive, that the law has frequently been decided, even in the construction of acts of parliament, upon what has been the general understanding of lawyers as to the true intention of those acts of parliament : and I will instance such a case under the statute of jointure. Your lordships' house determined, in the case of *Drury v. Drury*, 3 Bro. cases in Parl. 492, that a rent charge settled on an infant was, within the statute of jointure, 27 H. 8, c. 10, a good bar of dower ; not because such was the literal interpretation of the statute, but because such had been *the constant practice of conveyancers and others touching the subject ; and it was expressly upon that ground, that your lordships' decision at that time went ; and I do conceive it is of the utmost importance that your lordships should guide your judgment by that criterion, whenever it can be applied ; for, otherwise, my lords, all property must be in hazard. My lords, it is more especially of importance with regard to marriage settlements. They are ordinarily prepared by those persons who employ their minds in the construction of deeds ; and what persons of that description consider to be the law, acted upon for a length of time, and not disputed in courts of law, should be taken to be the general impression upon the minds of lawyers upon the particular subject. How are you otherwise to understand the intent of parties in a settlement, which really and truly is as much, I may say, the view which the person who prepared it has upon the subject as the view of the parties ; for the parties to a certain degree are ignorant of the words that are used, unless so far as they are advised by the persons whom they consult ; and, therefore, the practice of conveyancers upon subjects of this description is, I conceive, a most important consideration, and, wherever that has prevailed for a great length of time without impeachment in a court of justice, I take it, it ought to be considered as a true exposition of the law.

My lords, I have thought it necessary to say so much upon that part of the case which has been just before your lordships, because, I think, it would be highly dangerous to treat it in the manner in which it has been treated by a learned judge ; and, with great deference, I cannot agree to what the learned judge said, because I think that practice most important to the consideration of the case, if you wish to preserve property to persons who are in possession, *613] which may be defeated upon the *construction of deeds and instruments, unless you give them that construction which lawyers have constantly put on them, though not conformable to the precise rule, supposing that language to be literally understood.

My lords, with respect to the case before you, it does appear to me, that it is necessary to consider, for the purpose of the final decision of this question

only the very words of the settlement under consideration. My lords, words used in an instrument of this description must be construed according to the subject to which they are applied. The words here used, and which are in question, are applied to a power over a particular description of property ; the power is one of three powers applying to three descriptions of property, and varying according to those three descriptions. First, of property which was under the settlement, let under leases for life or lives, or for years determinable upon life or lives ; secondly, of property that consisted of lands not under such leases, but under rack-rent leases ; and, thirdly, of mines.—Now, my lords, may we not conclude, that the persons who formed this instrument contemplated these three species of property under the different circumstances in which they stood ? And what is the manner in which they contemplated that property, which was leased for lives or years determinable upon lives ? what did they mean to give by the power as to that property ? They meant to give the same power of enjoyment which was possessed by the former owners of the property. By the nature of that property, no benefit would be derived from it for a considerable term of years, except by renewing the leases from time to time as they dropped ; and, therefore, they gave a power to grant leases of that part of the property, reserving what had been before reserved in as beneficial a manner in all respects or more, giving the power to receive more, but not to receive less, not only as to the *rent, but as to the services. In every instance of a particular lease, every thing was to be reserved exactly in [*614 the same manner as it had been reserved by the prior leases, or at least not less beneficially. With respect to the second description of property, there the power is to lease at the best and most improved rent. My lords, the words are added, “that can be reasonably had or obtained.” Does that word “reasonably” really and truly, though perhaps introduced from caution into it, vary the instrument the least in the world ? Would it not be a sufficient execution of the power, if the best and most improved rent had been obtained according to reasonable estimation of the best and most improved rent ? But I should consider from that, although the rent reserved may not be the very best rent that could be got, yet, if it is fairly, and honestly, and reasonably, the best rent that can be reserved, without any fine derived by the person, who granted it, that it is a good lease : the word “reasonable,” though introduced in this part of the instrument, is a word merely of caution, and would not alter, in any degree whatever, the construction of the power.

My lords, with respect to the two parts of the property, that which is on leases for lives or for years determinable on lives, and that at rack-rent, there were introduced words with respect to a power of re-entry on non-payment of rent, the first is expressed in one way, the second in another way. We find different terms used, as it seems to me, for this reason. With respect to the second description of property, the words are precise, “and so as in every such lease there be contained a clause of re-entry, in case the rent or rents thereupon to be reserved be behind or unpaid by the space of 28 days, after the times thereby respectively appointed for payment thereof.” These words are precise. Why were there not precise words in the other *power ? For this manifest reason, because the other power referred to existing leases ; [*615 it referred to that which was the ordinary mode of executing the power with respect to such property, namely, that, on the dropping of one life, the lease shall be surrendered, and a new lease, precisely similar, be granted for three lives. Why, my lords, the powers of re-entry, which were contained in the former leases of every description, were the very powers to which the settlement meant to refer ; with this addition,—that if, in any of the leases that existed, there was not a power of re-entry for non-payment of the rent, they meant that such a power should be contained in future ; and, therefore, the words there used are of loose description. I think it is a mistake to suppose

the words are precise : the words are not precise : the words are loose ; and the great error, as it seems to my mind, in the opinions that have been formed pronouncing this lease invalid, is in the supposition that the words are precise. I repeat they are not precise, and are merely a note or memorandum intimating, that a power of re-entry is to be reserved ; and if, in the former leases, such a power was not reserved, (and probably the person who made the settlement had not an opportunity to look into all the leases to see the form in which they were made,) then, there should be such a power reserved ; but, in any other respect, that they should be in conformity to the prior leases. My lords, it appears in the case of the lease in question, that the power of re-entry was reserved in the former lease, not simply on the non-payment of rent ; but it was reserved on the non-performance of the services, such as a service at the mill, a reservation of a capon ; if the engagements were not observed, the power of re-entry extended to the whole. My lords, taking it, therefore, that the meaning of the settlement was this, not to give any precise *direction with respect to the nature of the power, but to give a general direction in the nature of a memorandum, if I may so express it, that there should be a power of re-entry,—is not that the natural construction of the words, and is not the construction, which is attempted to be put upon the words, a forced construction ; an attempt to make them more strict than they really are ?

My lords, suppose a contract was entered into between two persons, one of them having the property, and the other willing to take that property, and that contract purported, that there should be in the lease to be granted under that contract, a power of re-entry for the non-payment of the rent, how would that contract be executed, if it was to be specifically performed under a decree of a court of equity ? Would a court of equity have ever thought they were compelled, under the terms of that contract, by those words to require, that the power of re-entry should be a power of re-entry absolutely upon the non-payment of the rent at the day, and without the common and ordinary provision, that it should only be in case there was not a sufficient distress ? Would not those words be construed by what was the common and ordinary practice ? The common and ordinary practice, certainly, is to frame a power of re-entry in the manner in which the power of re-entry in this lease is framed. My lords, what must have been in the mind of the conveyancer who prepared this settlement, when he inserted in the settlement the proviso, that a power of re-entry for non-payment of rent should be reserved without expressing more ? Must he not have had it in his mind, according to the usual habit of persons of that description, that this was a species of note or memorandum which would have been expressed in a similar manner in the contract for a lease to be executed in pursuance of the settlement ? My lords, I *do, therefore, conceive, that, in this case, it must be taken to be the intention of the parties to the instrument, not to be precise with respect to the terms in which the power of re-entry was to be reserved ; but, merely, to give a note, signifying, that some power of re-entry should be reserved for non-payment of rent ; meaning thereby that, wherever that power did exist in the former leases of the same lands, it should be inserted in any new leases ; and that, wherever no such power had been reserved, then, that a power should be inserted such as would be required under such a contract as I have described.

My lords, the more I consider the subject, the more I feel convinced that all the doubt which has been suggested upon the subject has been founded upon a construction of the words of this instrument, which, I submit, they do not by any means bear. They were not intended, as it has been supposed, to express precisely and positively what should be done. They were intended to refer to the leases that had been previously executed of the same property, to provide that the rent should be reserved in as beneficial a manner in every respect as before ; and that if there was an omission in the former leases of the power of

re-entry, that a power should be given ; that is, such a power as a court of equity would insert in a lease under a contract.

But suppose it had not been a question before a court of equity, but before a court of law,—suppose the person who entered into the contract had executed a lease, with a power in the terms in which the power is conveyed in this lease ; or suppose, on the contrary, he had executed it with a power of re-entry upon non-payment of the rent at the day, and the question had been—whether, in either of those leases, in a court of law, the contract had been properly executed or not ? Would a court of law have differed from a court of equity on *the subject, if they had said—In what manner will a court of law execute such a contract as this ? in what manner would a person who was employed as a conveyancer in the habits of business, have framed a lease under such a contract ?—and then taken it to be a proper or an improper execution of the contract, according to the interpretation given to that contract by men habitually engaged in framing such contracts ? Upon the whole, therefore, it does appear to me, that the lease is a valid lease, because it is made, as it is found by the special verdict, in conformity to the other leases ; and I consider the words of the settlement, referring to those leases, to have the effect of saying in this particular case—where there has been a power of re-entry for non-payment of rent, a similar one shall be reserved. If the question had arisen, on the renewal of a lease containing no such power, how the power of re-entry was to be reserved, then I should say, that it was to be reserved according to the practice of the owner of the estate in letting leases of other parts.

Therefore, upon the particular words of the settlement of 1757, and not upon any general view of the case, I conceive, that this lease ought to be supported, and, consequently, that the judgment of the Exchequer Chamber should be reversed, and the judgment of the King's Bench affirmed.

The house, accordingly, on the motion of the lord chancellor, reversed the judgment of the Court of Exchequer Chamber, and affirmed the judgment of the Court of King's Bench.

*SHEE v. ABBOTT.

[*619]

The court will not set aside the justification of bail on account of perjury subsequently discovered, but will leave the party to his indictment for perjury.

Pell, Serjt., moved for a rule *nisi* to discharge the rule for allowance of bail in this cause, on the ground of gross fraud and perjury ; one of the bail having sworn on the 5th of February, that he was the occupier of a house, which, but four days before, he had sworn to be his brother's. *Pell* referred to *Gould v. Berry*, 1 Chitty's Rep. 143. But,

The court thought that case not in point, and intimating that the plaintiff's remedy was by indicting the bail for perjury, *Pell*

Took nothing by his motion.(a)

(a) Dallas, C. J., was absent.

SMITH v. WILTSHERE and Others.

Some constables, under a warrant to search a house for black cloth which had been stolen, finding no black cloth, took cloth of other colours, and carried it before a magistrate, refusing, at the same time, to tell the owner of the house searched, whether they had any warrant or no : Held, that they were within the protection of the stat. 24 G. 2, c. 44.; and that an action against them ought to have been commenced within six months after the grievance complained of.

TRESPASS. At the trial before **BURROUGH, J.**, Taunton Spring assizes, 1821, it appeared, that the defendants, who were constables, searched the plaintiff's house under a warrant for the discovery of some black kerseymere, which had been stolen. They found no black cloth, but they took cloth of other colours, [§ 20] which they carried before a magistrate. Upon *being asked whether they had a warrant, they refused to give any answer. The action not having been brought within six months after the alleged trespass, it was contended, that the defendants as constables were protected by the statute 24 G. 2, c. 44, s. 8; and the jury, under the direction of the learned judge, found a verdict for the defendants.

Pell, Serjt., on a former day moved that this verdict should be set aside, and a new trial be granted, on the ground that, as the defendants were specifically authorized to take black cloth, in taking any cloth other than black they were not acting as constables protected by the statute, but as mere unauthorized trespassers, so that the jury should have been directed to find for the plaintiff. He cited *Price v. Messenger*, 2 B. & P. 158, as expressly in point; and contended that, unless the plaintiff was bound down by the last case of *Parton v. Williams*, 3 B. & A. 330, the previous cases of *Money v. Leach*, 3 Burr. 1742; *Milton v. Green*, 5 East, 233; *Bell v. Oakley*, 5 M. & S. 259; *Postlethwaite v. Gibson*, 3 Esp. 226, showed that the protection of the statute only extended to cases where constables were acting in obedience to a warrant from a magistrate.

The court having taken time to consider,

DALLAS, C. J., now delivered the judgment of the court. This is an action of trespass for breaking and entering the plaintiff's house, and seizing his goods; and, also, in another count, for seizing his goods only, brought against constables and others acting in their aid. The defendants produced at the trial a warrant [§ 21] of a justice of peace, commanding them to search the *plaintiff's house for certain cloth suspected to have been stolen, and to seize it. They, accordingly, searched and seized certain cloth not strictly falling within the description of the warrant. The action was not brought within six calendar months from the time of seizure. The question is, whether the defendants are entitled to the benefit of the statute 24 Geo. 2, c. 44, s. 8? We are of opinion that they are.

The case of *Parton v. Williams and others*, 3 B. & A. 330, is in point, where the defendants, having a warrant to seize the goods of A., seized by mistake the goods of B., and the court held the action ill brought after the lapse of six calendar months. All the judges then held, that the 8th sec. of 24 Geo. 2, was intended to give the constables, some benefit not given by the 6th section, observing, that the 6th section protected them absolutely and at all times against any action for acts falling within that section, namely, *acts done in obedience to a warrant*, and that it was nugatory to limit to six months by the 8th section, actions, which, by the 6th section, could not be brought at all. It is true, that, in *Parton v. Williams*, the case of *Price v. Messenger and Another*, 2 B. & P., 158, does not appear to have been cited, where the defendant, having a warrant to search for and seize stolen sugar, seized certain sugar which was not stolen, and also certain tea and nails; and where one of the judges is reported to have said, that, when the defendants seized the teas, they were not acting in obedience to the warrant. But that point did not there arise; for the defendants had suffered judgment by default as to the teas and the nails; and the decision was, [§ 22] that the *defendants did act in obedience to the warrant, within sect. 6, although the sugar seized turned out not to have been stolen: and no question whatever arose on sect. 8.

The only case, therefore, that militates against *Parton v. Williams*, is the case, which was there fully considered of *Postlethwaite v. Gibson*, 3 Esp. 226. That, however, was only the opinion of one very learned judge at *nisi prius*, and is the less to be regarded, because the plaintiff there ultimately submitted

to be nonsuited, so that the opinion could not afterwards be questioned. That case, therefore, was properly disregarded in *Parton v. Williams*.

In *Parton v. Williams*, the court did not expressly decide that the 8th sect. applies to all cases of constables acting as such, but we think that their reasoning extends to such construction, and that such is the true construction. The words *as aforesaid*, there refer either to the words immediately preceding, namely, *for any thing done in the execution of his office*, to which extent parties are protected by the sect. 8th, and it would be strange if constables were not equally protected; or else they are explanatory only of the word "person," and sect. 8, by the words "or person acting as aforesaid," means any person, not an officer, who acts by order and in aid of an officer. *Godin v. Ferris*, 2 H. Bl. 14, in trespass, and *Saunders v. Saunders*, 2 East, 254, in trover show, that, when a statute limits the time of bringing any action against an officer to a certain time, from the time of the act by him done, the time must be computed from the original seizure of the goods.

Rule refused.

*Between ELIZABETH MURTHWAITE, JOHN MACPHER- [**623
SON, and CHARLOTTE, his Wife, and Others, - - - Plaintiffs;

AND

GEORGE BARNARD, MARIA BARNARD, CHARLES MURTHWAITE,
JOHN CUTHBERTSON, and Others, - - - Defendants.

And between GEORGE BARNARD, an Infant (by his next friend,) Plaintiff;

AND

ELIZABETH MURTHWAITE, JOHN MACPHERSON, and CHAR-
LOTTE, his Wife, JOHN CUTHBERTSON, and Others, Defendants.

Devise to three trustees of all his freehold, leasehold, and copyhold estates, and all his personal estate, in trust, to pay legacies and annuities, (the annuities to be paid out of his 3 per cent. stock) and all the rents, issues, profits, dividends, interest, profits and produce of the residue of his estate and effects, to his three nieces, E. M., M. M., and C. M., share and share alike, for the term of their respective lives; and after the decease of them, or either of them, that the lawful issue of them, and each of them, should have his or her mother's share of such rents, &c., for life; and if either of the nieces should die in the lifetime of the other, without issue, the share of her so dying should be divided equally between the survivors of the nieces for their respective lives, and afterwards by the issue of the survivors of the nieces; and if all the nieces save one should die without issue, such one should have the whole for her life; and, after her decease, the issue of such niece, if more than one, should enjoy the whole, share and share alike; if but one, should enjoy the whole alone; such parts as were freehold to them, if more than one, their heirs and assigns, as tenants in common, and not as joint-tenants; if but one, to him or her, his or her heirs and assigns. If all the nieces should die without issue, the whole to go to devisor's next male heir of the name of M., his heirs and executors. M. M. married G. B., who died leaving M. M. and one son. C. M. married, but had no issue. Two of the trustees died. A large surplus of personal estate remained, after paying debts, legacies, and annuities. Held,

*1st. That the surviving trustee had the legal estates in the freehold tenements de- [**624
vised.

2dly. That the nieces took no legal estate in the freehold tenements.

3dly. That the son of G. B. took no legal estate in those tenements, and would take none if he survived the three nieces.

4thly. That if the will had commenced with the words, "all the rents, &c." and the passage before these words had been omitted, the three nieces would respectively have taken under the will, in the said freehold tenements, estates for life; with cross-remainders between them for life, in the event of one or two of them dying without lawful issue.

5thly. That the said G. B. would now have an estate in tail in remainder in his mother's one undivided third part of the said freehold tenements, subject to be divested in part by the birth of other children of his mother, whether sons or daughters; and that he would have an estate in tail in the whole of the said freehold tenements, in the event of his being the only issue of the three nieces living at the death of the survivor of them, no other issue having been born.

THOMAS MURTHWAITE, by his last will and testament, duly executed and attested, so as to pass freehold estates, devised to Mrs. Margaret Murthwaite,

Mr. John Cuthbertson, and Mr. John Janes, all his freehold, copyhold, and leasehold estates, and all his personal estate and effects whatsoever; in trust, to pay thereout the several legacies and annuities in his will specifically mentioned, all which annuities, he thereby ordered to be paid out of such sum as should be standing in the *3 per cent.* consolidated bank annuities in his name, at the time of his decease, and that the said annuities should commence from and immediately after his decease: all the rents, issues, dividends, interest, profits and produce of all the residue of his estate and effects, of what nature, kind, or quality whatsoever, as well real as personal, which he should die seised or possessed of, interested in, or any way entitled to, at the time of his decease, he devised unto his three nieces, Elizabeth Murthwaite, Maria Murthwaite, and Charlotte Murthwaite, daughters of his brother, equally to be divided between them, share and share alike, for the term of their respective natural lives, subject to such provision and disposition as was therein after provided, concerning the house and premises then in his occupation, with the furniture, plate, jewels, books, linen, and implements of household then therein, and his carriage and horses. And from and after the decease of them, or either of them, he declared it to be his will and meaning, that the lawful issue of them, and each of them, should have and enjoy his or her mother's share of such rents, issues, dividends, and profits, for *life, in like manner, and he declared it to be his further will and meaning, that if either of his said nieces should happen to die in the lifetime of the others or other of them, without issue of her body lawfully begotten, that the share of her so dying without issue, should go to and be shared, and divided equally between the survivors of his said nieces, for their respective lives, and afterwards by the lawful issue of the survivors of his said nieces, in like manner, and if all his said nieces and their issue, save one, should die without issue, lawfully begotten, then he declared it to be his will and meaning, that such surviving niece should have and enjoy the whole of the rents, issues, dividends, interests, and profits of such residue of his estate and effects, for and during the term of her natural life; and from and after her decease, he directed that the lawful issue of such surviving niece, if more than one, should have and enjoy the whole of the rents, issues, dividends, interest and profits of all such residue of his estate and effects, equally between them, share and share alike. And if but one, then that such only one should have and enjoy the whole of such part thereof as was personal, to and for his or her own use and benefit. And to hold so much, and such part and parts thereof as were freehold to them, and each of them, if more than one, their heirs and assigns as tenants in common, and not as joint-tenants; and if but one, then to such only one, his or her heirs and assigns, for ever. And that they should hold so much, and such parts thereof as were copyhold, at the will of the lord or lords, lady or ladies of the manor or manors, of which the same were holden, in like manner. And if all his said nieces should die without issue, then from and after the decease of the survivor of them without issue, he devised the whole of such residue of his estate and effects, as well real as personal, and as well freehold as copyhold, to his next *male heir of the name of Murthwaite, to hold to such male heir, his heirs, executors and administrators in like manner.

The testator died on the 23d November, 1808, without having revoked or altered his will, and leaving his said three nieces, Elizabeth Murthwaite, Maria Barnard, then Maria Murthwaite, and Charlotte Macpherson, then Charlotte Murthwaite, and Margaret Murthwaite, John Cuthbertson, and John Janes, him surviving, and the testator left his said three nieces, his heirs at law, and likewise his customary heirs.

Margaret Murthwaite, and John Janes, alone proved the will of the testator.

Maria Barnard, then Maria Murthwaite, in the year 1809, intermarried with George Barnard, who died on the 5th October, 1817, leaving Maria his wife sur-

viving; and there was issue of the said marriage, only one child, viz. George Barnard.

In the year 1814, Charlotte Macpherson, then Charlotte Murthwaite, inter-married with John Macpherson, but they have at present no issue.

John Janes, one of the executors and trustees of the testator, died in the year 1814, leaving Margaret Murthwaite, and John Cuthbertson, his co-trustees, him surviving, and Margaret Murthwaite died in the year 1816, leaving John Cuthbertson, and also her said daughters, Elizabeth Murthwaite, Maria Barnard, and Charlotte Macpherson, surviving her.

A very large surplus of the testator's personal estate and effects remains after paying his funeral and testamentary expenses, and his debts and the legacies, and annuities bequeathed by him.

Charles Murthwaite, would now be the next male heir of the testator of the name of Murthwaite, in case the said Elizabeth Murthwaite, Charlotte *Macpherson, and Maria Barnard, were now dead without leaving issue. [*627]

On the hearing of this cause before the vice-chancellor, his honour directed this case to be made for the opinion of this court, and that the questions should be,

1st. What estate and interest the said John Cuthbertson, the surviving trustee, now has under the said will of the said testator, in the freehold tenements devised to the said Margaret Murthwaite, John Cuthbertson, and John Janes, as aforesaid?

2d. What estates the said testator's said three nieces, Elizabeth Murthwaite, Maria Barnard, and Charlotte Macpherson, respectively took under the said will of the said testator, in the said freehold tenements?

3d. Whether the said George Barnard now has any, and what estate in the said freehold tenements, and what estate he will have in the freehold tenements, in case he shall be the only issue of the three nieces living at the death of the survivor of them, no other issue having been born?

In case the court shall be of opinion, that by the will as above stated, the whole legal estate in fee simple in the freehold tenements, is now vested in John Cuthbertson, then in case the will had commenced with the words, "all the rents, &c." and the passage before these words had been omitted,

4th. What estates the said testator's said three nieces, Elizabeth Murthwaite, Maria Barnard, and Charlotte Macpherson, would respectively have taken under the said will of the said testator, in the said freehold tenements? and,

5th. Whether the said George Barnard would now have any, and what estate in the said freehold tenements, and what estate he would have in the freehold tenements, in case he shall be the only issue of the three *nieces living at the death of the survivor of them, no other issue having been born? [*628]

Hullock, Scrjt. The three nieces of the devisor took estates tail in the freehold and copyhold estates, with cross-remainders, and the personal property in thirds absolutely; for where a limitation of a freehold will carry an estate tail, in the case of personality, the first legatee takes absolutely, 9 Ves. 203.

The estates in the freehold depend upon the meaning to be put upon the word *issue*; the question being, whether by that word is meant issue in the large and indefinite sense, or only the immediate children of the nieces; and whether the limitations beyond the issue are to depend on a failure of issue generally, or on a failure of the issue of the nieces at their respective deaths. The testator's general intention was, that all the issue of his nieces should take and not that the property should be confined to their children only; he could not have intended, that if all the children of the nieces should die in their mothers' lifetime, leaving grandchildren, such grandchildren should be excluded and the estate go over; and yet, this might very easily happen, if the nieces take only estates for life. There is no case in which such general words as the present have been confined to a dying without issue at the time of the

death. The word *issue* is *nomen collectivum*, and takes in the whole generation, *ex vi termini*, (a) *Lord Beauclerk v. Dormer*, 2 Atk. 308; *Saltern v. Saltern*, 2 Atk. 376; *Attorney-General v. Hird*, 1 Bro. C. C. 170; *Doe dem Ellis v. Ellis*, 9 East, 386; *Crooke v. De Vandes*, 9 Ves. 203; *Barlow v. Salter*, 17 Ves. 479; *Tenny dem. Agar v. Agar*, 12 East, 261.

*The cases of *Porter v. Bradley*, 3 T. R. 143; *Roe v. Jeffery*, 7 T. R. *629] 589; *Forth v. Chapman*, 1 P. Wms. 663, and others of a like nature, may be distinguished from the present, both as to the intention of the devisor and the expressions used. Where the general intent of the devisor conflicts with some particular intent, the particular intent must be sacrificed, *King v. Burchell*, Ambler, 379; *Robinson v. Robinson*, 1 Burr. 38, and the court will pursue the construction adopted in *Doe dem. Dodson v. Grew*, 2 Wils. 322, and in *Denn dem. Webb v. Puckey*, 5 T. R. 299. The trustees took no legal estate in the realty, for there was personality out of which they might discharge all the legacies; and, according to the limitations in this will, the realty becomes vested by the statute of uses in the *cestui que* trust. An estate to trustees, in trust to let A. and B. take the rents and profits, is an estate vested in the *cestui que* trust. Bro. Ab. tit. *Feoffment*, pl. 52; *Broughton v. Langley*, Salk. 678 p; *Kenrick v. Lord W. Beauclerk*, 3 B & P. 175; *Doe dem. Leicester v. Biggs*, 2 Taunt. 109; *Right dem. Phillips v. Smith*, 12 East, 455.

Blosset, Serjt. The trustees take an estate in fee; the nieces, estates for life, with remainder to their issue in tail, and cross-remainders between them. G. Barnard takes a vested remainder in tail in his mother's share, subject to be divested, in part, by after-born issue of his mother, and a contingent remainder in the share of his aunts. The trustees take a legal estate in fee, for they have legacies and annuities to pay, and it does not appear that the personality will certainly be sufficient for "that purpose, nor indeed that it exists at all.

*630] They have also a legal estate, to support contingent remainders. The nieces take only an estate for life, because that is limited to them by the express and unambiguous words of the will. It is not necessary to dispute the cases cited on the other side, because they do not apply to first takers, where an estate for life is expressly given to them, and the remainder-men take as purchasers in tail; but they may apply to the remainder-man, and show that he takes in tail; for it may be admitted, that it was never intended the heir at law should take till the whole of the issue was exhausted: if so, the words *for life*, as applied to the issue, must be rejected, and they must take in tail.

The following certificate was afterwards sent:

This case has been argued before us by counsel: we have considered it, and are of opinion,

1st. That John Cuthbertson, the surviving trustee, now has the legal estate in fee simple in the freehold tenements, devised by the will of the testator to Margaret Murthwaite, the said John Cuthbertson and John Janes.

2d. That, consequently, the testator's three nieces, Elizabeth Murthwaite, Maria Barnard, and Charlotte Macpherson, took no legal estate, under the said will, in the said freehold tenements.

3d. And that the said George Barnard has now no legal estate in the said freehold tenements, and will have none at the death of the survivor of the three nieces.

4th. That if the will had commenced with the words "all the rents, &c," and the passage before those words had been omitted, the testator's three nieces would respectively have taken under the will in the said freehold tenements, estates for life, with cross-remainders between them for life, in the event of one or two of them dying without lawful issue.

*631] 5th. And that the said George Barnard would now have an estate in tail, in remainder, in his mother's one undivided third part of the said

(a) Per Hale, in *King v. Melling* 1 Ventr. 229.

freehold tenements, subject to be divested, in part, by the birth of other children of his mother, whether sons or daughters; and that he would have an estate in tail, in the whole of the said freehold tenements, in the event of his being the only issue of the three nieces living at the death of the survivor of them, no other issue having been born.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

*MEDLYCOTT v. JORTIN.

[*632]

Devise of land to devisor's granddaughter, A. M., for life; remainder to trustees, during the life of A. M., to support contingent remainders; remainder to all and every the children in tail, with cross-remainders between them in tail; and, in default of issue of all and every the children of the granddaughter, to devisor's daughter, B. C. M., for life; remainder to such one or more of the children of B. C. M. as B. C. M., by deed or will attested by three witnesses, should appoint for their lives; remainder to all and every the child and children of such daughter or daughters, to be appointed by B. C. M., as aforesaid; and if only one should be appointed, to her and the heirs of her body; and if more than one should be appointed, all of them to take their mother's shares *per stirpes*, as tenants in common, and not as joint-tenants; with cross-remainders between them, the children of such daughters, as to their mother's shares in tail; and, on failure of such issue of any one or more of such daughters, with cross remainders to the others of their issue; and in default of appointment, and of any appointment not exhausting the whole fee, the land, or so much as should not be exhausted by appointment, to B. C. M. for life; remainder to all her daughters for their lives, with cross-remainders for life between them; remainder, during the lives of the daughters of B. C. M. and the survivor, to support contingent remainders; and, for default of issue of any or either of the daughters of B. C. M., to B. C. M. and her heirs.

- A. M. died, sole and intestate, leaving B. C. M. her heir at law, and heir at law of devisor. B. C. M. has nine daughters, many of whom are married and have issue: *Held*,
1. That B. C. M. has in the lands an estate for life, with an ultimate reversion to herself in fee.
 2. That, in default of appointment, the daughters now living of B. C. M. have, respectively, in the lands estates for life in remainder, as tenants in common, with cross-remainders amongst themselves for life; with remainders to themselves in tail, respectively.
 3. That, in default of appointment, the grandchildren of B. C. M. have no estate in the lands.
 4. That B. C. M. has power by appointment to designate which one, or more than one of her daughters, is, or are, to take under the will; that if more than one are designated, they will take under the will as tenants in common for life; with remainder to their respective children, as tenants in common in tail; with cross-remainders between them (the children of the appointed daughters) in tail: such cross-remainders to take place, as well with regard to the shares of their respective mothers as with regard to the shares of their aunts, in the event of a failure of issue of any of the aunts.

His honour the vice-chancellor ordered the following case to be made for the opinion of the judges of this court.

*George Hill late one of his majesty's serjeants at law, made his will in writing, in the following words: (a) "This is the last will and testament of me, George Hill, of Rowell, one of his majesty's serjeants at law. I devise my estate at Irchester to my granddaughter, Ann Mannsell, for her life; with remainder to my friends, John William Bramston and John Jortin, barrister at law, and their heirs in trust, only for and upon the several uses and trusts hereinafter mentioned (that is to say,) for and during the life of my said granddaughter, in trust only, to support the contingent estates hereinafter devised; and, after her decease, to all and every the children in tail, with cross-remainders between them in tail: and, in default of issue of all and every the children of my said granddaughter, I devise the said estate to my daughter, Barbara Cockayne Medlycott, for life; with remainder to any such one or more of the children of such my said daughter as my daughter shall, by deed or will attested by three witnesses, appoint for their lives; with remainder to all and every the child and

(a) This is an exact transcript of the will, which is very confused.

children of such daughter or daughters, to be appointed by my said daughter, as aforesaid ; and if only one be appointed, then to her and the heirs of her body ; and if more than one be appointed, then all of them to take their mother's shares, *per stirpes*, as tenants in common, and not as joint tenants ; with cross-remainders between them, the children of such daughters, as to their mother's shares in tail, and on failure of such issue of any one or more of such daughters ; with cross-remainders to the others of their issue : and for and in default of such appointment, and of any appointment not exhausting the whole fee, I give and devise my estate at Irchester, or so much of the fee as shall not be exhausted *634] by any appointment or appointments made as aforesaid, *^{to} to my daughter, B. C. Medlycott, for life ; with remainder to all her daughters, for their lives, with cross-remainders for life between them ; with remainder, during the lives of all the said daughters of my said daughter Barbara and the life of the survivor, to support contingent remainders : and for default of issue of any or either of the daughters now living of my said daughter Barbara, I give the said estate to my said daughter Barbara and her heirs : I give all my real estate, except that at Irchester, to my said daughter Barbara for her life, exclusive of her present or any future husband ; with all and singular the same powers of appointment and disposition, rights and estates, as before given to her, over, in, or after the remainder of my Irchester estate, in default of issue of my said granddaughter, Ann Mansell : and I do declare that the profits of my said real estate last devised shall go to the several persons successively, to and in trust for whom they are authorized to be appointed. I give all my personal estate to my said trustees whom I appoint executors of this my will : in trust, to retain thereout, for their own respective use, the sum of 200*l.* a-piece, for their trouble in executing the trusts of this my will, and to apply all the residue thereof, or so much as shall be necessary in or towards the payment of all my debts ; and the surplus, if any, to invest in real estate, and settle the same to the use of the same person and persons respectively as should be entitled by this my will to the residue of all my real estates, except that at Irchester ; and in case my personal estate should be deficient to pay all my debts and legacies, and the costs of executing the trusts thereof, then to raise the deficiency by sale or mortgage of a sufficient part of my real estate (except that at Irchester;) and I do hereby declare, that the entirety of my copyhold estates whatsoever, *635] whether surrendered or not surrendered to the use of my will, are included in the above devise of all my real estate, except that at Irchester ; lastly, in case the equitable or beneficial interest of, in, or to all or any part of my real or personal estate, after payment of my debts and legacies, and the costs of executing the trusts of my will, is not already disposed of, or should, eventually, during my life or afterwards, become not disposed of, I give the same to my said trustees and their heirs, in trust for my said daughter, B. C. Medlycott, to and for her sole and separate use, exclusive of her present or any future husband as aforesaid."

The testator died on the 21st of February, 1808, leaving his granddaughter, Ann Mansell, daughter of his elder daughter, (who died in the testator's lifetime,) and his daughter the plaintiff, B. C. Medlycott, his co-heiresses at law ; Ann Mansell is since dead, unmarried, and intestate, leaving the plaintiff, B. C. Medlycott, her heir at law. At the date of the said testator's will, and at the time of his decease, the plaintiff had ten children, all daughters, one of them is since deceased, of full age, but unmarried, the nine others, all of full age, are, 1st, Matilda Sophia, now the wife of Robert Austen, L.L. D., who has issue seven children now living ; 2d, Barbara Maria Cockayne ; 3d, Mary Ann, now the wife of William Adams, L.L. D., who has issue six children now living ; 4th, Georgiana Cockayne ; 5th, Sophia Cockayne ; 6th, Caroline Eliza, now the wife of Thomas Phillip Mansell, Esq., who has issue five children ; 7th, Catharine Cockayne : 8th, Frances Annabella, now the wife of William Asshet-

ton, Esq., but who hath no issue; and, 9th, Elizabeth Charlotte Cockayne. The executors named in the will, duly proved it; but John William Bramston is since dead, leaving John Jortin sole surviving executor. All the married daughters of the plaintiff, B. C. Medlycott, were unmarried at the death of the testator. The whole of the testator's estate *at Irchester was freehold; [*636 the copyhold lands were descivable in the same manner as freehold lands at common law. The questions for the opinion of the court were:

- 1st, What estate the plaintiff, B. C. Medlycott had in the freehold and copyhold lands of the testator respectively?
- 2d, Whether the daughters then living of the plaintiff, B. C. Medlycott, respectively, had any and what estate in the testator's freehold and copyhold lands respectively?
- 3d, Whether the grandchildren of the plaintiff, B. C. Medlycott, or any and which of them, had any and what estate in the testator's freehold and copyhold lands respectively?
- 4th, Whether the plaintiff, B. C. Medlycott, had any and what power of appointment over the testator's freehold and copyhold lands respectively?

Hullock, Serjt., for the plaintiff, contended, that Ann Mansell took an estate for life in the Irchester property, it being immaterial what estate the trustees took; remainder to the trustees for her life only; remainder to her children in tail, with cross-remainders in tail; remainder to the plaintiff for life, with a power of appointment in fee: and that, in default of appointment, the plaintiff's daughters would take an estate as tenants in common for their respective lives; remainder, after the surviving daughter's decease, to all the granddaughters as tenants in common tail; and, for default of such issue, to the plaintiff in fee. He argued, that the plaintiff had the power of appointment in fee, chiefly from the expression in the will, "and in default of any appointment not exhausting the whole fee, I give, &c." With respect to the other real estate, though there was no disposition of the remainder in default of *appointment, nor any [*637 devise to trustees; yet the same power of appointment being given, it might also exhaust the fee, and so must be construed a power of appointing in fee. *Barford v. Street*, 16 Ves. 135; *Whiskan and Cleiton's case*, 1 Leon. 156, and Sugd. on Powers, 96, 97, were referred to, and *Liffe v. Salting-stone*, 1 Mod. 189, and *Dighton v. Tomlinson*, 1 Com. 194, cited as nearest in point.

Lens, Serjt., for the defendant, allowing that it was immaterial what estate the trustees took, said that the power of appointment might either confer a bare power of selection or nomination to estates already limited by the will, or a power of appointing the quantity of estate to be received, as well as of nominating the party who should receive; and he argued, that the latter construction seemed the more reasonable. He then contended, that, in default of appointment, the objects of the devisor must be looked to, and that those objects could not be so well effected as by giving the daughters of the plaintiff an estate tail.

Blosset, Serjt., for the grandchildren, argued, that the plaintiff had only a power of selecting the objects who should take estates carved out by the will, and could not herself appoint the quantity of estate to be received. From the clause which gave them a power of sale in certain events, he inferred that the trustees took an estate in fee, and he denied that the expression, "in default of an appointment exhausting the fee," afforded any inference that the plaintiff had a power of appointing in fee; contending, that the devisor only meant, in default of appointing all the shares of the property.

*The following certificate was afterwards sent:

This case has been argued before us by counsel: we have considered [*638 it, and are of opinion,

1st, That the plaintiff, Barbara Cockayne Medlycott, has in the freehold and

copyhold lands of the testator respectively an estate for her life, with an ultimate reversion to herself in fee.

- 2d, That, in default of appointment, the daughters now living of the plaintiff, Barbara Cockayne Medlycott, have respectively in the freehold and copyhold lands of the testator estates for life in remainder as tenants in common, with cross-remainders amongst themselves for life, with remainders to themselves in tail respectively.
- 3d, That, in default of appointment, the grandchildren of the plaintiff, Barbara Cockayne Medlycott, have no estate in the testator's freehold or copyhold lands.
- 4th, That the plaintiff, Barbara Cockayne Medlycott, has power by appointment to designate which one or more than one of her daughters is or are to take under the will: that if more than one are designated, they will take under the will as tenants in common for life, with remainder to their respective children as tenants in common in tail; with cross-remainders between them (the children of the appointed daughters) in tail; such cross-remainders to take place, as well with regard to the shares of their respective mothers, as with regard to the shares of their aunts, in the event of a failure of issue of any of the aunts.

R. DALLAS,
J. A. PARK,
J. BURROUGH
J. RICHARDSON.

*FIELDING and Others v. KYMER and Others.

The circumstance of a principal's drawing bills on his factor, to be provided for out of the proceeds of goods consigned, does not authorize the factor to pledge the goods: therefore, where A. consigned goods to B. for the purpose of sale, at the same time drawing bills to the amount of 1588*l.* 5*s.* 7*d.* on B., to be provided for out of the proceeds; and B. pledged the goods for 2500*l.* to C. (who knew that A. was the owner,) and paid 294*l.* in discharge of one of the bills; and C. afterwards sold the goods for B. for 4033*l.*; it was held, that A. was entitled to recover from C., in an action for money had and received, (in which 1533*l.* was paid into court,) the whole balance of 2500*l.*

This was an action for money had and received, to which the defendants pleaded the general issue. At the trial before DALLAS, C. J., at the London sittings after Michaelmas term last, the jury found a verdict for the plaintiffs for 2,500*l.*, subject to the opinion of this court upon a case, of which the following is the substance.

The plaintiffs carried on business as merchants in partnership at Rio de Janeiro, under the firm of Gill, Fielding and Brander: the defendants were brokers in London. Joseph Lyne and Co. carried on business chiefly as commission merchants in London, and also as general merchants on their own account. In the beginning of December, 1819, Joseph Lyne and Co. received from the plaintiffs' firm, a letter, dated Rio de Janeiro, 13th October, 1819, containing the following advice. "We ship by the Fortitude, Clement Worts, master, bound to your port, and addressed to your consignment, 533 bags of coffee of the first quality, invoice and bill of lading of which you have herewith, the former amounting to Rs. 14,579 380; and, against the same, we have valued on you in six bills as particularized at foot; we have to request you will dispose of this consignment to the best advantage, and protect us by insuring against all risks." These bills, which were drawn at 60 days' sight, amounted to a total of 1588*l.* 5*s.* 7*d.* sterling, and among them was one for 294*l.* 5*s.* 6*d.*, payable to the order of J. Carmichael. "The list was headed, "Note *640] of bills drawn against shipment per Fortitude." The invoice accom-

panying the letter commenced thus, "Rio de Janeiro, 13th October, 1819. Invoices of 533 bags of coffee, shipped by Fielding, (a) Brander, Avelyne, and Lyne, on board the Fortitude, Clement Worts, master, bound for London, and consigned there to Mr. Joseph Lyne and Co., for sale, on account and risk of Messrs. Gill, Fielding, and Brander." The bill of lading contained a like consignment of the goods to Lyne and Co.

The ship arrived with the coffee on board, in the beginning of February, 1820. On the 12th February, the coffee in question was put into the hands of the defendants, as *brokers* for sale. Charles Lyne, a partner in the house of Joseph Lyne and Co., then asked the defendants if they would make an advance upon it, to enable J. Lyne and Co. to meet the bills, and at the request of the defendants, delivered the invoice to them. They consented to advance 2500*l.* upon the coffee, and, accordingly, on that day accepted a bill for this amount at two months, which Joseph Lyne and Co. immediately discounted with their bankers, and the bill for 294*l. 5s. 6d.*, mentioned in the letter of 13th October, was paid out of the funds so raised. All the other bills were provided for by the plaintiffs, and were never any charge upon Jos. Lyne and Co., or their estate. At the time of the above advance, the coffee being in the West India dock warehouses, the transfer order to the dock company was handed to the defendants, and they were empowered to sell; but they were to consult with Jos. Lyne and Co. as to the price before they sold. The *Defendants sold the [*641] coffee for Jos. Lyne and Co. on the 15th March, 1820, and rendered an account, by which it appeared, that the net produce of the sale was 4033*l. 0s. 6d.* On the 15th of February, 1820, Joseph Lyne and Co. stopped payment, and a commission of bankrupt was afterwards issued against them. At the time when they stopped, they were indebted to the old firm of Gill, Fielding, and Brander, and likewise to the new firm of Fielding, Brander, Avelyne, and Lyne.

The bill for 2500*l.* was duly paid by the defendants. The jury found specifically as a fact, that, at the time when the defendants agreed to advance the 2500*l.*, it was known to them, that the coffee was the property of the plaintiffs. The defendants paid into court the sum of 1533*l. 1s. 6d.*

The question for the opinion of the court was, whether the plaintiffs were entitled to recover the entire balance of 2500*l.*, or only part of it. If the court should be of opinion, that they were entitled to recover the whole, then the verdict was to stand. If less than the whole, the verdict was to be reduced accordingly. If the plaintiffs were not entitled to recover, a nonsuit was to be entered.

Taddy, Serjt., for the plaintiffs. The points for the decision of the court will be three.

The plaintiffs contend, first, that they are entitled to the whole balance; secondly, that, at all events, the defendants can only deduct the sum of 294*l. 5s. 6d.* applied by the house of Lyne and Co. to the payment of the bill drawn by the plaintiffs; and, thirdly, that the form of action makes no difference, save that, in the action as brought, the plaintiffs can recover no more than the money received by the defendants. And first, the general rule (not peculiar to the law of England) *that a factor cannot pledge the goods of his principal applies here. In *Martini v. Coles*, 1 M. & S. 150, wherein all the cases [*642] were collected, that principle was recognised, and the point solemnly decided. If a factor, having a specific authority, exceeds it, he who deals with such factor, must take the consequence of not inquiring. (b) In some of these cases, the advance has been general, and on the credit of the goods of third persons; but that makes no difference. It does not cease to be a pledge, because it is

(a) In October, 1819, Gill had retired, and a new partnership was formed between the remaining partners, under the firm of Fielding, Brander, Avelyne, and Lyne.

(b) *De Bouchout v. Goldsmid*, 5 Ves. 213.

more or less extensive, or more or less complicated with the property of others. In this case, there is the additional fact, that, at the time when the advance was made, it was stated to the defendants, by Lyne and Co., that the goods were drawn against; the defendants knew that the goods were consigned for sale, and took the risk of Lyne and Co. applying the advance properly. No hardship, therefore, can be urged on behalf of the defendants, who had perfect knowledge of all the facts. They do not take up the bills drawn by the plaintiffs on Lyne and Co., but they put an acceptance for the whole advance, into the hands of Lyne and Co.; out of the proceeds, of which acceptance not one of the bills is paid, save that for 294*l.* 5*s.* 6*d.*

As to the second point, more facts should have been found, before the defendants can be entitled to make the deduction of 294*l.* 5*s.* 6*d.* It is not enough, that the money happens to be applied to the payment of the bill drawn by the plaintiffs. The authority to the factor is to sell, and to apply the proceeds of the sale to the plaintiffs' bills. The principal, therefore, contemplates the sale of the goods before the arrival of the bills; but no sale takes place till long afterwards, and before it does take place, Lyne and Co. *stop payment, and a commission issues. Besides, the house of Lyne and Co. was indebted to both firms, and by taking the bills into the account, the balance would be altered.

*643] As to the third point, the form of action only precludes the plaintiffs from recovering more than the sum received. The plaintiffs go beside the agreement between Jos. Lyne and Co. and the defendants, they find the goods turned into money, and make their claim for the amount, affirming only the fact of the receipt of the money. If the action had been brought on the agreement, that must have been adopted; but the plaintiffs only follow the money as they follow the goods; they were strangers to the conversation. *Smith v. Hodson*, 4 T. R. 211, is the only case which looks the other way. In *Wright v. Campbell*, 4 Burr. 2046, Lord MANSFIELD says, "If a factor pays money over, with notice to a third person, then it may be followed in the hands of such third person; for, in such case, it remains in his hands just as it did in the hands of the factor himself." *Shipley v. Kymer*, 1 M. & S. 484, is in favour of the plaintiffs. *Pulteney v. Kymer*, 3 Esp. N. P. C. 182, (cited in *Martini v. Coles*) is the only case on the other side; and in that case, the different decisions on the subject were not brought before Lord ELDON.

Bosanquet, Serjt., for the defendants. The plaintiffs are not entitled to recover in this form of action, inasmuch as the suing for money had and received amounts to a recognition of the original contract under which the money is obtained. If the defendants have tortiously converted the money, it is no longer the money of the plaintiffs, but the money of the defendants, and in that view *644] of the case, trover is the proper remedy. *When Joseph Lyne and Co. were vested with authority to sell, and pay the bills transmitted to them, a general authority to raise money for the purpose of paying the bills must be implied. The existence of this authority the plaintiffs might have disputed in trover, but by suing in *assumpsit* they admit it. *Smith v. Hodson* is a strong authority for the defendants on this point. The defendants do not dispute the general rule, that a factor cannot pledge the goods of his principal, nor that the purchaser must take the consequence of dealing with one who exceeds his authority. No distinction, it may be admitted, now exists in the law, whether a person dealing with a factor knows him to be such or not; but the question here is, whether Lyne and Co. were not authorized to do what they have done, and the defendants contend that Lyne and Co. had authority, because the bills were to be provided for by this particular cargo. The case of *Pulteney v. Kymer* is recognised in that of *Martini v. Coles*, and is distinguished by Lord ELLENBOROUGH: and the case put by BAYLEY, J., in delivering his judgment, is strongly in favour of the defendants. At all events, the plaintiffs having re-

ceived the benefit of the 29*4l. 5s. 6d.*, are not entitled to claim that sum a second time. (a)

Taddy, in reply. From *Moses v. Macfarlane*, Burr. 1006, downwards, it has been held, that, by bringing an action for money had and received, the plaintiff does not affirm the contract, but rather disaffirms it. The general doctrine is laid down in *Tenant v. Elliot*, 1 B. & P. 3. [PARK, J., to the same point is the case of *Clarke v. Shee*, Cowl. 197. By bringing the action for money had and received, the plaintiff only recognises that there is money in "the defendants' hands to which the plaintiff is entitled, but he does not [*645] recognise any of the apparatus by which it got there.] As to the main question, if it is held, that a broker may advance to a factor, where the consignor draws on the factor, the whole doctrine which prohibits pledges by a factor will be undermined. The case of *Pulleney v. Kymer* is not *ad idem* with this case. The present defendants knew that the goods were consigned for sale.

Dallas, C. J. Speaking at the moment, and for myself, I entertain no doubt on this case. The general rule, that a factor has no authority to pledge the goods of his principal is quite clear: and I consider this as a pledge. Now how is this attempted to be distinguished from the other cases? Bills are drawn against the consignment; and, it is said, the drawing of the bills amounts to an authority to the factor to raise money to meet those bills. But is there any case of a consignment from the West Indies, where bills are not drawn, to be provided for out of the proceeds of the goods when sold? If the doctrine contended for were valid, in every such case of consignment the act of drawing bills would amount to an authority to pledge;—to a repeal of the well established and wholesome rule, that a factor cannot pledge the goods of his principal.

The facts of this case are very strong, for the defendants had full knowledge that the goods on which they advanced the money were not the property of Lyne and Co., but the property of the plaintiffs. **Le Blanc, J.**, in *Martini v. Coles*, says, "whether it might not originally have better answered the purposes of commerce to have considered a person in the situation of Vos, having the apparent symbol of property, as the true owner, in respect of that person who deals with him under an ignorance of his real character, is a question upon which it *is too late to speculate, since it has been established by a [*646] series of decisions, that a factor has no authority to pledge, whether the person to whom he pledges, has or has not a knowledge of his being a factor;" and he goes on to say, "When brokers exceed their authority as brokers, and become pawnbrokers, by advancing money on the goods before sale, then they subject themselves to all risks." The only difference between the case now before the court and that which I have been reading, is that, in the latter, the brokers made advances to the factor, without knowing that he was not the owner of the goods; whereas, in the present case, there was actual knowledge, on the part of the defendants, that the goods did not belong to those who pledged them. Can it, then, be said, that the factor had authority to raise money on the goods in his hands, because the bills were drawn against those goods? That assertion seems to me to beg the whole question. The defendants cannot repeal the law by entering into an agreement with the persons on whom the bills were drawn; and, with the knowledge of the law (which knowledge must be presumed) they think fit to advance money to Lyne and Co., who are factors, on the goods of their principals. Can they avail themselves of their own illegal act, to defeat the rights of third persons? I should have no hesitation whatever on the case, had it not been for the mention of the case of *Duclos v. Ryland*, in which it is said, that Lord C. J. Abbott reserved

(a) The case of *Duclos v. Ryland* was mentioned as pending in the Court of K. B., and being of the same complexion with this case.

a similar point. We will look into that case. On that ground, and on that ground only, is the decision suspended ; and the opinion now given by the court may be considered as final, unless this case is mentioned again.

PARK, J. I entertain no doubt upon this case. The point that a factor cannot pledge the goods of his *principal, I consider to be settled. The difficulty presented to us in this case is, the fact that the principals residing abroad, drew their bills against the goods consigned to Lyne and Co. But it is the constant course of trade, for the merchant abroad to consign his goods, and draw bills, to be provided for by the proceeds of such goods, when sold. The question into which this case resolves itself, is,—did the plaintiffs authorize Lyne and Co. to pledge the coffee to the defendants ? and I am of opinion, that no such authority can be deduced from the facts which form this case. I think the case of *Daubigny v. Duval*, 5 T. R. 604, important. In that case, the factor pledged the goods of his principal ; and the court held, that the principal was entitled to recover the value of them against the pawnee, on tendering to the factor what was due to him without any tender to the pawnee. Of the case of *Duclos v. Ryland*, I can form no judgment, not having looked into it. But I can hardly think, that Lord Chief Justice ABBOTT (after the class of cases, which I had always considered as having set the question of a factor's right to pledge the goods of his principal at rest) would reserve that question, as one requiring solemn decision at this day. Though it is settled, that the ignorance or knowledge of the broker, as to whether the goods on which he advances the money are the property of the person who pledges them or of a third person, makes no difference as to the liability of the broker, in cases where he has advanced money to a factor on the goods of his principal, the fact of the ignorance of the broker in such cases, is frequently pressed upon the courts as a great hardship. But such is not the case here ; for it is specifically found, that, at the time when the defendants agreed to advance the 2500*l.*, it was known to them that the coffee was the property of the plaintiffs.

*BURROUGH, J. This case appears to me to stand on the ordinary ground. A factor has, without authority, pledged the goods of his principal, which he has no right to do. I am therefore of opinion, that the judgment must be for the plaintiffs.

RICHARDSON, J. As at present advised, it appears to me, that the plaintiffs are entitled to recover. The general rule, that a factor cannot pledge the goods of his principal would be frittered away, if a consignee were allowed to construe the drawing of bills by the consignor against the goods consigned, into an authority to pledge those goods. In this case, too, the sum advanced was mainly for the accommodation of Lyne and Co. The acceptance for the sum advanced to them on the coffee was immediately discounted by Lyne and Co. at their own bankers. This acceptance was for 2500*l.*, the amount of the bills drawn by the plaintiffs against the coffee on which this advance was made, being only 1588*l.* 5*s.* 6*d.*, and to the payment of but one of these bills for 294*l.* 5*s.* 6*d.* was the sum advanced, applied by Lyne and Co. The defendants made no inquiry as to the amount of the bills drawn by the plaintiffs against the coffee ; they inquired only into the value of the coffee, on which the advance was to be made. It seems to me, that the general rule must apply equally to cases where bills are drawn by the principal against his consignments, and to cases where no such bills are drawn.

As to the form in which this action is brought, I think there is nothing in the objection raised. It is said that, by this form of action, the plaintiffs affirm the contract, as to the advance agreed on by the agent ; but the action proceeds on the circumstance of the defendant's having obtained and sold goods of the plaintiff, without their consent or authority, and disaffirms any *contract which Lyne and Co., as agents of the plaintiff, may have made with the defendants. In various cases, much stronger than the present, the party injured

may waive the special injury, and declare for money had and received. Where goods of a trader, after an act of bankruptcy, are taken in execution, or otherwise disposed of without the concurrence of the assignees, they are not bound to sue in trespass or trover. They may waive the *tort*, and proceed in *assumption* for money had and received, to recover the produce of the sale.

The only point which has raised a difficulty in my mind is, the question of the right of the defendants to deduct the sum of 294*l.* 5*s.* 6*d.*, with which Lyne and Co. paid one of the bills drawn by the plaintiffs against the goods consigned. But it seems to me, that this must fall within the same rule as governs the rest of the case. Lyne and Co. having no authority to pledge, but only an authority to sell, I think the defendants have no right to deduct that sum from the verdict; for it seems to me, that the assignees of Lyne and Co., in settling their account with the plaintiffs, will have a right to carry the sum to the credit of the estate of Lyne and Co.

Per curiam. The case may be considered as decided, if it be not mentioned again.

Judgment for the plaintiffs. (a)

(a) The case was not mentioned again.

*WILLIAM WINSOR, SUSANNAH WINSOR, JANE BOUCHER, [*650
and THOMAZINE JAMES v. THOMAS PRATT, EPHRAIM BUR-
FORD, and ISAAC SHEFFIELD.

A., on the 17th July, 1812, made a will, by which he devised certain real estates to his wife for life; and, on her death, to M. B.; and, on the death of his wife and M. B., to his executors in fee, upon certain trusts. The will, which was attested by three witnesses, concluded by stating that A. had signed his name to the two first sides, and his hand and seal to the last side of the will, which was written on three sides of a sheet of paper. A. put his name and seal at the end of the will, but did not sign his name to the two first sides. In November, 1816, he made various interlineations and obliterations, the effect of which, as regarded his real estate, was to confine the first devise to his wife, to her widowhood, and to strike out the devise to M. B.; the original date was struck out, and the day of November, 1816, was substituted. The will was never resigned, republished, or reattested; but, in the following month, A. caused a fair copy of it to be made, and added one interlineation not affecting his real estate: but the copy was never signed, published, or attested. The will and fair copy were found locked up in a drawer at the residence of the testator, who died on the 24th December, 1816: Held, that the will was well executed; and that there was no revocation of it as it stood originally.

DETINUE to recover the title-deeds of real estates, of which Charles Reeks died seised; plea general issue. The cause was tried before DALLAS, C. J., at the sittings at Westminster after last Easter term, when a verdict was found for the plaintiffs, subject to the opinion of the court, upon a case, of which the following is the substance. Charles Reeks, on the 17th July, 1812, made a will, by which he devised the rents and profits of the greater part of his real estates to his wife, for her life, and on her decease, to Mary Burford, the mother of his wife, for her life, and on the decease of his wife and her mother, he devised the same to his executors in fee. Upon trust to sell and divide the produce equally between his three sisters, Jane Boucher, Susannah Winsor, and Thomazine James, or to the issue of such of them as should happen to depart this life before the same should be receivable. He also devised other real estates *to his wife in fee, and certain leasehold property and personality, to her [*651 absolutely. After bequeathing some legacies, he directed his residuary estate to be sold, and the produce to be divided equally between his wife and his three sisters. The will, which was attested by three witnesses, concluded by stating that he had signed his name to the two first sides, and his hand and seal to the last side of the will, which was written on three sides of one sheet of paper. The testator did put his name and seal at the end of the will, but did not sign his name to the two first sides. In November, 1816, he made various interli-

ncations and obliterations, the effect of which, as regarded his real estate, was to confine the first devise to his wife to her widowhood, and to strike out the devise to her mother. The original date was struck out, and day of November, 1816, was substituted. The will was never resigned, republished, or reattested; but in the following month, the testator caused a fair copy of it to be made, and added one interlineation not affecting his real estate. But the copy was never signed, published, or attested, and on the 24th December, 1816, the testator died without issue. The plaintiffs, Jane Boucher, Susannah Winsor, the wife of William Winsor, and Thomazine James, were co-heiresses of the testator, and as such, claimed to be entitled to the real estates of which Charles Reeks died seised, subject to the dower of his widow. The widow claimed to be entitled to the whole of the estates under the devise. The will and fair copy were found locked up in a drawer at the testator's residence, the day after his death. The defendants, whom he had appointed executors in January, 1817, obtained probate of the will of the 17th July, 1812, with the interlineations and *652] obliterations; and having obtained possession of all the *title-deeds of the real estates, refused to deliver them up to the plaintiffs.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover, and to what extent, or in respect of which the real estates of the testator mentioned in the said will. If the court should be of opinion, that the plaintiffs were entitled, the verdict to stand with nominal damages; the defendants undertaking, by rule of court, to deliver up all the title-deeds to the plaintiffs to which they might be entitled. But if the court should be of opinion, that the plaintiffs were not entitled to recover, then a nonsuit was to be entered.

Pell, Serjt., for the plaintiffs, made two points: first, that the will, as signed, was not well executed, and for this he cited *Right v. Price*, 1 Doug. 241; but this was rejected by the court, as too clear for argument: secondly, that the obliterations and alterations amounted to a revocation, and avoided the will. He admitted that the cases of *Sutton v. Sutton*, Cowp. 812; *Larkins v. Larkins*, 3 B. & P. 16, and *Short v. Smith*, 4 East, 418, showed that an obliteration might be made so as to leave the will good *pro tanto*, though it might avoid the obliterated devises; but he relied mainly on the alteration of the date, which, he observed, distinguished this case from other cases of obliteration, and cited *Onions v. Tyrer*, 1 P. Wms. 343. He urged that the will was never executed so as to satisfy the statute, 29 Car. 2, c. 3. It was not executed in 1812, because the testator has declared that it should not be deemed a will of that date.

*653] The will, then, was a will of no date. It was not executed *in Noyember, 1816; for the case finds that there was no republication.

Lawes, Serjt., for the defendants. The obliterations and alterations made by the testator in his will are inoperative, and do not amount to a revocation. The circumstances of the will do not fall within the statute of frauds; and the devise to the trustees is valid, though they may take the fee at an earlier period than the testator first intended. In this case there is no evidence of the existence of the unchanged *animus revocandi*; and an intention to revoke, resting in intention, and not carried into execution, is no revocation of a will previously made, *Doe v. Perkes*, 3 B. & A. 489. The date, on which much stress has been laid, is not essential; and *Larkins v. Larkins*, 3 B. & P. 16, and *Short v. Smith* show that interlineations are inoperative without a republication, and that obliterations not striking out the whole of the devise do not amount to a revocation.

Pell, in reply, insisted that the cases cited, the authority of which he did not dispute, were beside the present question, the alterations in this will not being partial, but affecting the whole subject-matter of the will.

DALLAS, C. J. The facts of this case are so completely in the possession of the court, that it becomes unnecessary for me to recapitulate them. And two

questions arise : first, whether the will of 1812 was duly executed ; and, secondly, whether that will, supposing it to have been duly executed, has been cancelled *or revoked. And, upon the first point, it has been contend-
ed, though without laying any great stress upon the objection, that the will of 1812 was not valid for want of sufficient execution ; inasmuch as the will, being on three sides of a sheet of paper, the testator states, at the end of the third side, that he has signed his name to the two first sides thereof, and his hand and seal to that side ; whereas, in point of fact, he has not signed the two former sides, but only the last. And, to maintain this ob-
jection, the case of *Right, Lessee of Cater v. Price* has been relied on, and particularly the following part of Lord MANSFIELD's judgment in that case : "There are many particular circumstances in this case besides the general question. The testator, when he signed the two first sheets, had an intention of signing the others, but was not able. He, therefore, did not mean the signature of the two first as the signature of the whole will. There never was a signature of the whole." Now, I own, as I understand this case and the prin-
ciple on which it was decided, that it appears to me to turn directly the other way ; for it shows an intention on the part of the testator, and an incapacity to carry that intention into execution. In that case, the will was on five sheets of paper, and the testator had signed two of them, and showed an intention to sign the others, but was unable to do so ; but, in this case, the will was written all on one sheet of paper, and the testator has signed it at the end. There, the intention of the testator was defeated by incapacity ; here, the act of the testator points to nothing prospective ; and, whatever might have been his intention at one time of signing the former sides, he has by his final signature abandoned that intention. In the first objection, therefore, there is no validity ; and the case then resolves itself into the main question—whether *the will of 1812, being a valid will, has been revoked ? That question turns upon the facts of the particular case ; and from them it appears that the testator never intended to die intestate. That he had no such intention in 1816, is evident from the fair copy of the altered will found among his papers after his death. The question, then, will be, whether, if he intended his altered will to stand in the place of the former, he has carried his intentions into execution ; and it has been contended, that the obliterations amount to a distinct act of revocation of his former will. Now, the revocation of wills may be effected in many different ways ; but the principle to be found in the books applicable to all of them is, that a mere intention, not carried into effect, does not operate as a re-
vocation. The act done by the testator may be merely demonstrative of his intention ; and I take the distinction to be, that where there is evidence of an intention to revoke, if that intention has not been carried into effect, the former will remains precisely as it was. In the case before the court, all the evidence of an intention to revoke appears on the face of the will itself ; but if the testator had intended to effectuate such revocation, it is not too much to suppose that he would have conducted himself differently. He might have torn the will,—he might have burnt or cancelled it ; none of which acts he appears to have done. It seems to me that the testator did not intend to revoke the devises altogether, or to die intestate ; but to make another will, merely altering some of the devises. And I take the rule to be, that where a testator designs to revoke a former will by an instrument making new dispositions of his property, he discovers only a conditional intention to revoke ; or, in other words, his intention to revoke is so coupled in appearance with his new testamentary act, that, unless *he completes such testamentary act by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking. And, again : The effect of can-
celling depends upon the validity of the second will, and ought to be taken as one act done at the same time ; so that if the second will is not valid, the can

celling of the first being dependent thereon, ought to be looked upon as null and inoperative. My opinion goes on the broad ground, that, in my view of the facts belonging to this case, the testator only intended to carry his alterations into execution by a future will, which intention he never carried into effect. I, therefore, think that the original will is not void, and consequently that the plaintiffs are not entitled to recover.

PARK, J. I am of the same opinion on both points ; nor do I think that the case of *Right v. Price* assists the first. That the testator had not signed the two first sides of the will is, I think, immaterial. The court, indeed, seemed to me to dispose of this point in an early stage of the argument. The second, involving the great question in the case, has been so fully entered into by my lord, that it will be unnecessary for me to go much at length into it. The difficulty presented to us arises from the erasures and interlineations, which it is said, amount virtually to a revocation of this will. The statute of frauds has pointed out the mode of avoidance of wills, namely, by actual revocation ; and says, that " all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator, or by his directions ; or unless the same be altered by some other will or codicil in writing, or other writing." The alterations in this will do not, in *657] my opinion, *answer the description given in the statute. The other modes enumerated by the statutes are, burning, cancelling or tearing. Can it be predicated of this will that it was either burnt, cancelled, or torn ? Even if it could, we must look to see whether the act done were done *animo revocandi*, a question, generally, for the jury, but, in the present case, for the judges to determine. Now, the rule I take to be that which has been drawn by his lordship from the case of *Onions v. Tyrer*. If the testator's intention were only to make obliterations on that paper with a further view, such bare intention will not, in point of law, amount to a revocation, though it were apparent from the case that the testator intended to execute the fair copy. And, in this view, I think the case of *Doe v. Perkes* does bear on the point before us ; for nothing can be stronger than the feeling manifested by the testator in that case against the devisee when he began the work of destruction, though he afterwards became calm, expressed himself satisfied that it was no worse, and fitted together the pieces into which he had torn the will. The learned judge who tried that cause left it to the jury to say whether the testator had done all he intended, or whether he was not prevented from completing the act of destruction which he intended ; and the court held, that this was properly left to the jury, and refused to disturb the verdict which was given in favour of the devisee. I recollect also a case which was tried before me in Northumberland, in which there was a similar result. I am clearly of opinion that the obliterations and alterations of this will, coupled with the circumstances of this case, do not amount to a revocation ; and, consequently, that the judgment ought to be for the defendant.

BURROUGH, J. It appears to me that the statute of frauds is decisive of this case. It is by no means clear *to me that the obliterations and interlineations alter the estate of the trustees, as to the freehold devise ; but supposing them to have this effect, I do not think that the case would be altered. I am satisfied that these are not obliterations or interlineations within the statute. Here is an inception of an act done by the testator, but no completion. The act of having a fair copy made, shows that something was meant to be done ; but this testator, who was an attorney, must have known that the execution of this paper must have taken place in the presence of three witnesses, to make it valid as a will affecting his real estate.

I think there is no foundation for the objection raised on the non-signature of the original will by the testator, on the two first sides. The last sentence in the will expresses that he has signed the three sides : of this he is perfectly cognisant, and signs the last of the three sides, thereby expressly adopting all

the three. I am, therefore, of opinion that the plaintiff has no right to recover the title-deeds, and that the present action will not lie.

RICHARDSON, J. I entirely agree with the rest of the court, upon both points. Upon the first, I shall merely say that I consider the will to be well executed; because the testator did all that he intended to do at the time of execution. It is quite clear that the testator did not intend to revoke, but only to alter his will; but, supposing that his intention was to revoke, he has not done so according to the direction of the statute of frauds. According to the case of *Sutton v. Sutton*, and the other cases, the obliterations and alterations made by this testator would not amount to a revocation of his will. But I think it better to take this case on the broad ground; for all the facts show that revocation was not the testator's object. He had a fair copy *made of the original will, [*_659 as altered; and, therefore, never intended to die intestate. The act of substitution was inchoate and incomplete, and totally inoperative till carried into execution.

Judgment for the defendants.

LUCKETT v. PLUMMER.

In a declaration in debt in C. B. a reference to the *clausum fregit* of the writ is not necessary; and an averment, under a *videlicet*, that the court was sitting on a day in vacation, may be regarded as surplusage.

THE declaration in debt, stated, that the defendant was summoned to answer the plaintiff of a plea, that he render to the plaintiff twenty pounds of lawful money of Great Britain, which he owes to and unjustly detains from him, and whereupon the plaintiff, in his own proper person, complains; for that whereas the plaintiff, "heretofore, to wit, on the 21st day of July, in the first year of the reign of our lord the now king, sued and prosecuted, out of the court of our said lord the now king, of the bench *here*, the said court being *then* and now at Westminster." Venue Middlesex. This was demurred to, on the ground, among other objections, that there was no setting out of the *ac etiam* and reference to the *clausum fregit* clause of the writ; and that the court did not sit on the 21st of July, which was a day in vacation.

Taddy, Serjt., in support of the demurral, cited *Estwick v. Cooke*, Ld. Raym. 1557; *Atkinson v. Anderson*. 3. T. R. 184; *Harrington v. Taylor*, 15 East, 378, and 1st Wms. Saunders, 600.

*But the court thought that the time being stated under a *videlicet*, [*_660 was immaterial, and might be rejected as surplusage; that it was sufficient if it appeared in substance that the writ was issued out of the court: and that it was unnecessary to load the declaration with a useless reference to the original *clausum fregit*.

GATES and Others v. COLE.

Tenants in common may sue in covenant, for neglect of repairs, the lessee of a house, who, subsequently to the demise, but before the breach alleged, becomes a co-tenant of the plaintiffs in the same house.

COVENANT by lessors of two undivided fourths, and one undivided third of a messuage against lessee for not repairing. Plea among others, that after the demise to the defendant, and before the breach complained of, one Bonner, who was interested in the residue of the premises, bargained and sold his share to

the defendant, whereby the defendant became tenant in common of the premises with the plaintiff. Demurrer and joinder, as to this plea.

Onslow, Serjt., in support of the demurrer. The question intended to be raised, is, whether one tenant in common, under the circumstances disclosed in the plea, can sue his co-tenant; and from the writ *de reparatione facienda*, it appears he can, Co. Lit. 200 b, even on privity of estate; but here, the defendant is in by his own act, and is sued on privity of contract. Co. Lit. 186 a, is an authority to show, that one joint-tenant may lease to his companion, and Bac. Ab. *Lease* I, 5, that one tenant in common may lease to his co-tenant; *661] and in **Snelgar v. Henston*, Cro. Jac. 611, it was decided, that one tenant in common might sue his co-tenant for rent.

Taddy, Serjt. *contra*. The authorities cited do not affect the present case, for the house being an entire thing, and the shares undivided, no action can be maintained against the defendant for not repairing, his covenant as lessee being merged in his new estate. In the authorities cited, the reversion at the time of suing was in the same hands as at the time of the demise, here it is in different hands at the time of the suit, which circumstance, according to *Webb v. Russell*, 3 T. R. 395, and *Stakes v. Russell*, 3 T. R. 678, is conclusive against the action.

In the writ *de reparatione facienda*, the co-tenant who sues, alleges willingness to perform his part of the repairs, here the defendant is called on to do the whole.

Per Curiam. The action is properly brought, and there must be Judgment for the plaintiff.

In replevin, plea of a former distress for the same rent, without adding that the rent was satisfied, is bad.

REPLEVIN for goods. Cognisance for rent arrear. Plea in bar, that cognisor, on a former occasion, made a distress for the identical rent, and took goods and chattels liable to distress sufficient to discharge the rent in arrear, and the costs and charges of the distress, and of the sale and appraisement thereof, and might have thereby paid the arrears of rent, and the costs and charges of the distress, sale and appraisement, but neglected and omitted to do so, and wrongfully and vexatiously made a second distress for the same rent. Demurrer, for that the plea in bar did not show, or aver, that the rent was satisfied by the distress alleged. Joinder in demurral.

Vaughan, Serjt., in support of the demurrer, referred to *Lear v. Edmonds*, 1 B. & A. 157, and *Lingham v. Warren*, 2 B. & B. 36, as in point for the defendant.

Heywood, Serjt., for the plaintiff. The case of *Lingham v. Warren* was decided on the authority of *Lear v. Edmonds*. But *Lear v. Edmonds* was decided on the principle, that it is necessary to show a satisfaction of the rent, and this principle is nowhere else to be found, the court too seem to have thought, that the provision of the statute of 2 W. & M. is optional, and not compulsory on the distrainer, and it did not appear that the distress had been sold; however, the expression in the statute is not, *may sell*, but *shall and may*; *663] which expression has always been deemed imperative, as appears by the *King and Queen v. Barlow*, Salk. 609, and all the cases which have been decided on the 8th and 9th W. & M., touching the assigning of breaches in actions on bonds. 2 Wils. 377; Cowp. 357; 5 T. R. 540. In the present plea it is averred, that the goods were liable, the omission of which averment

was objected to in *Lear v. Edmonds*. But even if it be necessary to aver satisfaction, in answer to an action for use and occupation, (as was the action in *Lear v. Edmonds*,) because the party who so sues, has other remedies by which he might have been satisfied, as debt or covenant, yet in replevin, where the defendant has taken upon himself to recover his rent by his own act, it is quite enough to aver a sufficient seizure, as the party who seizes, is bound to sell under the 2 W. & M.; this makes a distress a species of prerogative execution, which the court will watch narrowly; and if a sheriff levies in execution, though he does not sell, that will be a discharge to the defendant. *Mountenay v. Andrews*, Cro. Eliz. 237; *Atkinson v. Atkinson*, Cro. Eliz. 390. At common law, the distress operates only as a pledge; and a second pledge cannot be taken, where the landlord has had the benefit of a former one. Indeed the 17 Car. 2, c. 7, s. 4, is a statutory recognition, that the landlord cannot at common law distrain twice for the same rent, *Wallis v. Savill*, 2 Lutw. 1532. *Moore*, 7; Cro. El. 13; anon. S. C., and *Hutchins v. Chambers*, 1 Burr. 579, are clear authorities to show that a landlord cannot split his demand to make two distresses; and there is no difference between splitting the rent and taking two distresses. The vexation and inconvenience to tenants must be very great if such a course is permitted.

**DALLAS*, C. J. The only question in this case is, whether the plea is good or bad, and to that I confine my opinion. The objection to the plea is, that it does not show that the rent was satisfied by the former distress. There are two cases which decide that such a plea is bad. *Lear v. Edmonds*, and *Lingham v. Warren*, decided on the authority of *Lear v. Edmonds*, and the question now is, whether or no *Lear v. Edmonds* was improperly decided; in other words, whether three judges of the Court of King's Bench, have misconstrued the statute relating to distresses; in the outset, therefore, we are to say, that three judges are wrong, and to my mind that is a strong proposition: however, if they are wrong, their decision is open to consideration, and it ceases to be authority if erroneous. But what arguments have been adduced to prove them wrong? The provision in the statute, is, that the party distraining shall and may sell; thence it is argued that he must, and that wherever *shall* is found in company with *may*, it means *must*. That I deny. It does not follow, that a party *must* sell, because he *may*; if so, it would go to this, that after seizure, a landlord could never come to any terms of agreement with his tenant. But it is clear from what *ABBOTT*, J. says, in *Lear v. Edmonds*, that the possession of the goods may be relinquished at the request of the party; and who ever doubted it up to this moment? It does not follow, therefore, that a distress *must* operate as a satisfaction, because it may be relinquished, and that brings us to the question, whether this plea is sufficient. Now it has been attempted to distinguish this case from the case of *Lear v. Edmonds*, because that was an action for use and occupation, but the plea was held bad in that case, because it did not show that the rent was satisfied, and that is the very defect alleged here. Lord *ELLENBOROUGH* says, "the *distress may enure as a satisfaction, or may constitute an injury: if the former, then the defendant ought to have pleaded those circumstances, which would make it operate as a satisfaction; for it is incomplete as satisfaction by the mere act of seizure." And so it is incomplete here. *BAYLEY*, J. says, "it was the duty of the defendant to set out the whole of his case;" and so it was here: he might have stated the whole of his case in the plea: the words "neglected and omitted," are not sufficient; if the distress had operated as a satisfaction, it ought to have been so stated. I should have entertained no doubt on the subject, even if no case had been before decided.

PARK, J. I see nothing in the plaintiff's argument to induce the court to think that the two former decisions are wrong. Much stress has been laid on the supposed inconvenience to tenants, but the inconvenience is all the other

way, and if the landlord must proceed to sell, the plaintiff should have shown that he was satisfied; for there are many cases supposable, in which the distress may be no satisfaction to the landlord, as where he withdraws it, relying on the tenant's word. I do not agree that *shall and may* in a statute are always imperative; they must be deemed imperative or not, according to the subject matter. The statute of William and Mary is a remedial law, and it was never meant, that the landlord must necessarily sell, because he has the power to do so. It certainly is not allowable for a landlord to split his rent, and purposely take two distresses, but Lord MANSFIELD says, it is convenient he should come a second time, if the first distress is not sufficient, otherwise he might be tempted to secure himself by taking an exorbitant distress in the first instance. I think, therefore, that the present plea is not sufficient.

*BURROUGH, J. We must overrule the two preceding decisions, if we *666] say that this plea is sufficient. But it contains no averment on which issue can be taken, though it might easily have done so; as if it had said, that the defendant wrongfully destroyed the distress. It rests therefore, on the same ground as the former cases, which in my judgment were well decided, and the present plea is bad for want of showing that the rent was satisfied.

RICHARDSON, J. I think the plea insufficient. For any thing that appears, the former distress may have been relinquished in kindness to the tenant, and I do not think any issue could have been taken on the words *neglected and omitted*. I am not satisfied that the statute of W. & M. is imperative as to a sale, though it is not necessary to pronounce an opinion on that point; but supposing it is so, that statute never meant to preclude parties from ending the proceeding by an agreement. The principle of the former cases is the same as the present, and there must be

Judgment for the cognitor.

*667]

***GRAY and Another v. BOND and Another.**

Where the lessees of a fishery had publicly landed their nets on the shore at A. for more than 20 years, and had, at various times, dressed and improved the landing place (both the fishery and the landing place having originally belonged to one person, but no evidence being offered to show that he, or those who under him owned the shore at A., knew of the landing nets by the lessees of the fishery;) Held, that it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery, by some former owner of the shore at A.

THIS was an action on the case, for disturbing the plaintiffs in the enjoyment of their right of drawing nets to land, on the banks of the river Derwent, wherein they had a fishery. The defendants pleaded the general issue, and at the trial before BAYLEY, J., at the York Spring assizes, 1820, a verdict was found for the plaintiffs, subject to the opinion of the court, upon the following case.

The river Derwent is a public navigable river in the county of York, the tide whereof flows to a point higher up the river than the place mentioned in the declaration called the Crabtree Fellings. This river forms the boundary of the manor of Elvington, which extends to the line of the stream, and the lord of that manor, from time immemorial, hath been seised of a fishery in the river on the Elvington side of the river, to the line of the stream thereof, and extending throughout the length of the manor which he claims, as appurtenant to the manor. Before, and at the time of the execution of the lease and release hereinafter mentioned, Richard Sterne was seised in his demesne as of fee of the manor of Elvington, and of the lands conveyed by the deed, as well as other lands within the manor, and adjacent to the river Derwent, and being so seised by indenture of lease and release, dated the 3d and 4th October, 1774, he con-

veyed to Ralph and John Dodsworth (among other things) the close of land upon which the felling called the Crabtree felling is situated. The plaintiffs are possessed for a term of years of the legal estate of and in the manor and fishery; and, at the time of the grievance *complained of in the declaration, were in possession of the fishery. It was proved at the trial, [668 that the owners of the fishery and their lessees, had, for above twenty years last past, and in the recollection of one witness, at the distance of 64 years ago, for the more convenient use and enjoyment of their said fishery, drawn and pulled their nets to and upon the bank of the river, at certain different parts thereof, on the Elvington side of the river, for the purpose of taking the fish out of the nets, and that they had occasionally dressed the landing-places, by sloping the foreshore, and levelling the ground with a spade. These landing places are called pulls or fellings, and are thirteen in number, within the manor of Elvington. The other fellings are situate upon different closes, which, before the time of the said conveyance, were and still are the property of the lord of the manor of Elvington; but the felling in question, called the Crabtree felling, is situate upon one of the closes which were conveyed to Ralph and John Dodsworth, by the before-mentioned deeds of lease and release, under whom Mr. Preston, the present proprietor of the closes, now claims and is seised of the same. There was no evidence either way, whether Ralph or John Dodsworth, or any person under whom Mr. Preston claims, or Mr. Preston himself had any knowledge of or was privy to the said use of the Crabtree felling. The defendants, as the servants of Mr. Preston, and by his direction, before the commencement of this action, placed stakes in and upon the Crabtree felling, so as thereby to prevent the plaintiffs from pulling their nets to land, and using the said felling so conveniently as before.

It was objected by the defendants at the trial, that, as the land upon which this felling was situated, had been conveyed by the owner of the fishery to the Dodsworths in 1774, without any reservation or any exception *of the right of landing nets upon the said felling, such right was entirely gone. [669 The learned judge left it to the jury to presume, from the evidence of enjoyment, a grant of the right to land nets upon the Crabtree felling, to the owners of the said fishery, by some former owner of the close whereupon it was situated, since the year 1774; and the jury thereupon found a verdict for the plaintiffs, damages 1s.

The question for the opinion of the court was, whether the direction of the learned judge was right. If the learned judge ought to have directed the jury to presume such grant, then the said verdict was to stand; but if not, then a nonsuit was to be entered.

The case was argued on a former day in this term.

Bosanquet, Serjt., for the plaintiffs, contended, that it was properly left to the jury to presume, from the evidence of enjoyment, a grant of the right to land nets upon the *locus in quo*, and cited *Campbell v. Wilson*, 3 East, 294; *Yard v. Ford*, 2 Wms. Saund. 175 b; *Keymer v. Summers*, Bull N. P. 74.

Hullock, Serjt., for the defendants. The cases cited for the plaintiffs do not apply. Mere lapse of time will not of itself raise against the owner the presumption of a grant. In *Campbell v. Wilson* there was a notorious user for twenty years exercised adversely. And so, in all the cases collected by Sergeant Williams in *Yard v. Ford*, particularly *Darwin v. Upton*, the grounds for such a presumption were infinitely greater than in the present case. One of the general grounds of a presumption, is the existence of a state of things which may reasonably be accounted for, by supposing *the matter presumed. (a) [670 Here, none of the parties interested were aware of the practice which obtained with respect to the landing of the nets upon the particular spot,

(a) Per Abbott, C. J., in *Doe v. Hilder*, 2 B. & A. 791.

Though an uninterrupted possession for twenty years and upwards, be a bar in an action on the case, yet the rule must be taken with this qualification, that the possession was with the acquiescence of the person seised of an estate of inheritance. The mere knowledge of the tenant is not sufficient, otherwise he might collude, to the great inconvenience of his landlord. *Daniel v. North*, 11 East, 372. The grounds for presuming the surrender of terms, are laid with equal tenderness to the interests of the owner of the inheritance, and show the jealousy with which the law sanctions a presumption. *Doe v. Wright*, 2 B. A. 719, 720; *Doe v. Hilder*, Ibid. 782. The distinction between this case and those cited for the plaintiffs is, that, in the latter, knowledge on the part of the person interested was presumed upon clear grounds. There is no such knowledge in evidence in this case, which completely falls within the reasoning of Lord ELLENBOROUGH, in *Daniel v. North*, and the rule there laid down by him and the rest of the court.

Bosanquet, in reply, was stopped by the court.

DALLAS, C. J. I think the question was properly left to the jury to presume or not, from the facts before them, a right on the part of the plaintiffs to land their nets on the *locus in quo*, and a grant from some former owner of the soil. We are not now called on to decide *whether the jury were right [671] or wrong in the conclusion to which they have come (though had I been one of them I should probably have come to the same,) but the question is, whether the learned judge left it to them properly to presume a former grant. I agree with the argument which has been urged on the part of the defendants, that mere lapse of time will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts; and here, where there is no direct evidence whether or not the owner of the land had any knowledge of what passed, the inference to be drawn must, in a peculiar degree, depend on the nature of the accompanying facts; and the presumption in favour of a grant will be more or less probable, as it may be more or less probable that those facts could not have existed without the consent of the owner of the land. The circumstances proved in the present case, were sufficient to leave to a jury, as circumstances from which the knowledge of the owner, and his acquiescence, on the supposition of a preceding grant, might fairly be presumed. This was done; and how could it be inferred that the owner had not such knowledge, when he was proved to be in possession of the property, when the landings were all made publicly, and the soil had actually been levelled to facilitate the plaintiffs' access. I entertain no doubt, that the question was properly left to the jury.

PARK, J. It seems to me, that it was most fitly left to the jury in this case, to presume a grant. Notwithstanding the distinction which has been attempted, I cannot distinguish this case from that of *Campbell v. Wilson*, at Lancaster, and if ever there was a strong case, that was one, because there had been an award and an enclosure, twenty-six years before. The circumstances [672] in that case, from which the knowledge of the owner of the soil might be inferred, were not stronger than those in the present. The case, indeed, does not come up to that of *Daniel v. North*, because there was something in the nature of the easement there which makes a difference. A landlord may not see windows thrown out, and a tenant may not feel the inconvenience; and this distinction is referred to by LE BLANC, J. But in the present case, there is reasonable ground to presume the knowledge of the land-owner, and the question was properly left to the jury.'

BURROUGH, J. Every case of this sort depends on its own circumstances, and the circumstances here place the point in a very clear light. Every act done by the plaintiffs for 46 years, on the *locus in quo*, would have been a trespass, if they had not a right of landing there; but from 1774 to the present time, all these acts have been done openly: and the only question is, whether

there were any facts from which a judge could leave it to a jury to presume a grant of the right in question. Undoubtedly, the circumstances were such as could scarcely have occurred without the knowledge of the owner.

RICHARDSON, J. This is not like a case of injuries arising to an owner from the collusion of his tenant; the question is, whether or no Mr. Preston had knowledge of what was taking place on his land; and I think the case was properly left to the jury.

Judgment for the plaintiffs.

*GEORGE PALMER, WILLIAM LOADEN, and Others, v. ANN [673
BATE, WILLIAM BATE, THOMAS WRIGHT VAUGHAN, and
Others.

An assignment to trustees of all the emoluments and profits which, during the life of A. and his continuing to hold the office of clerk of the peace, should arise or become due to him as clerk of the peace, or in respect of his office, *after deducting the salary or allowance of his deputy for the time being*, upon trust, to pay the interest arising on certain debts due from A., and from time to time render the surplus and residue, after satisfying the trusts to A., is invalid.

His honour the vice-chancellor, by decree made on the hearing of this cause, on the 3d June, 1820, ordered a case, of which the following is the substance, to be stated for the opinion of this court. The defendant, Vaughan, who is clerk of the peace for the city and liberty of Westminster, which office he has held since the year 1802, under the *custos rotulorum* of the city, liberty, and county, and from the time of his appointment, has executed the office by his deputy Lorenzo Stable, an attorney residing within the liberty, by indenture, dated the 25th January, 1806, assigned to George Palmer and William Loaden, their executors, administrators, and assigns, "All and singular the income, emoluments, produce and profits whatsoever, which, during the life of him, the said Thomas Wright Vaughan, and his continuing to hold the said place, or office of clerk of the peace for Westminster, should arise or become due, or payable to him, the said Thomas Wright Vaughan, as clerk of the peace for Westminster, or otherwise by reason, or in respect of his said place or office, and all arrears thereof, then due, *after deducting the salary or allowance of the deputy for the time being, of him*, the said Thomas Wright Vaughan, in the said office, and all other expenses attending the execution of the said office. To hold, receive and take the said income, emoluments, produce and profits, of all and singular other the premises thereby assigned, thenceforth *unto the said George Palmer and William Loaden, their executors, administrators, and assigns, upon trust, that the said George Palmer and William Loaden, and the survivor of them, his executors, administrators, and assigns, should in the first place, by and out of the same, retain and deduct, and reimburse themselves, and himself, certain costs and expenses therein particularly mentioned, and all such costs, charges, and expenses, as they, or any of them should have incurred, or become liable to pay, in or about the execution of the aforesaid trust. And should, and would in the next place, pay and apply the same in, or towards payment and discharge of the interest, which from time to time should become due, or owing to Thomas Baylis and Samuel Ridge respectively," on certain debts, due from T. W. Vaughan to Baylis and Ridge, according to the true intent and meaning of a covenant contained in the indenture. "And should from time to time render and pay all *the surplus* and residue of the said income, emoluments, produce and profits, which should from time to time remain, after answering and satisfying the trusts and purposes aforesaid, unto the said Thomas Wright Vaughan, his executors, administrators, or assigns, for his or their proper use and benefit."

The defendant, by the same deed, constituted the trustees, his attorneys, to demand, recover and receive the said income, emoluments and profits, and to give receipts and discharges for the same ; and covenanted, that neither he, his executors or administrators, would at any time thereafter, by himself or themselves, or by any agent or agents, receive or take into his or their possession, the said income, emoluments, produce and profits, or any part thereof, or revoke, or make void, the powers and authorities thereinbefore contained.

*The questions for the opinion of the court were,

*675] Whether the assignment of the income, emoluments, produce and profits of the office, or place of clerk of the peace for Westminster, after deducting the salary or allowance of the deputy for the time being, of the defendant Thomas Wright Vaughan, in the said office, by the said defendant, Thomas Wright Vaughan, to the plaintiffs, George Palmer and William Loaden, by the indenture in the pleadings mentioned, dated the 25th January, 1806, is a good and effectual assignment, and valid in the law ? And whether the said George Palmer and William Loaden could legally and of right receive and take the income, profits, emoluments, and produce of the said place or office, under, and according to the true intent, meaning and effect of the said deed of assignment, upon, and subject to the trusts, intents and purposes therein expressed and declared of and concerning the same ?

The case was argued on a former day in this term.

Lawes, Serjt., for the plaintiffs. There is no authority immediately applicable to this case : the decisions regard offices of a different nature. It is not contended that the office is saleable : it is a public office relative to the administration of justice, and the sale of it would be illegal by stat. 5 & 6 E. 6, c. 16. But this is merely an assignment of the profits of an office which is regulated by stats. 37 H. 8, c. 1, s. 3, and 1 W. & M. c. 21, s. 5. By the former, the nomination of clerks of the peace is given to the *custos rotulorum* ; by the latter, a residence in the county is required ; and, by both, it is enacted, that the office may be executed by deputy, to be approved of by the *custos rotulorum*. That the office is a freehold appears from *The *Queen against The Clerk of the Peace of Cumberland*, 11 Mod. 80, and *The King and Queen against Evans*, 12 Mod. 13 ; so much so that the succeeding *custos rotulorum* cannot displace the actual clerk. *Harcourt v. Fox*, 12 Mod. 42.

*676] Where profits are annexed to a freehold office, it cannot be said that the officer has not the disposal of them. Nor will public justice suffer from the assignment of them ; the fulfilment of the duties of the office by deputy being provided for. *Godolphin v. Tudor*, 1 Salk. 468, recognises the right of the principal to dispose of the profits of a public office, and *Stuart v. Tucker*, 2 W. Bl. 1137, shows that the use of the half pay of a military officer is assignable. A close analogy may be found in the assignment of the profits of ecclesiastical benefices ; the only requisite in such cases is, that the cure be provided for, as the execution of the office is in the present case. [DALLAS, C. J. Suppose the deputy dies, and the *custos rotulorum* refuses to approve the nomination of a new deputy, what becomes of the performance of the duties of the office ? Again, suppose that the deputy becomes ill, the principal must then perform the duties of the office, but how is he to perform those duties when there is nothing to sustain him ? PARK, J. The case of *Stuart v. Tucker* was much shaken by subsequent decisions. In *Barwick v. Reade*, 1 H. Bl. 627, it was held, that the full pay of a military officer could not be assigned by way of annuity ; and in *Arbuckle v. Cowtan*, 3 B. & P. 321, Lord ALVANLEY, C. J., in delivering judgment, says, "It is now clearly established, that the half-pay of an officer is not assignable, and unquestionably any *salary, paid for the performance of a public duty, ought not to be perverted to other uses than those for which it is intended. Notwithstanding the case of *Stuart v. Tucker*, in which it was held that the half-pay of an officer was assignable in equity, it

was expressly decided, in *Flarty v. Odlum*, that it was not assignable at all, which decision met with general approbation."]

Lens, Serjt., *contra*. It is admitted, that the office in question is not saleable; if, then, the officer cannot sell, can it be contended that he may pledge his office for any amount? The argument drawn from the provision for the deputy is beside the question. The principal cannot withdraw himself, otherwise there might be a hinderance of public justice. In the present case, the office is substantially no longer in the officer, but in those to whom he assigns the produce of it. Supposing the deputy to fail, there would be no one to perform the duties of the office. A military officer cannot assign his half-pay. (a) And the analogy drawn from cases of sequestration does not assist the plaintiff. Those cases turn on the old law of lay-fee. On suggestion that the clergyman has no lay-fee, the bishop levies, providing for the cure by appointing a curate and paying him out of the proceeds of the execution. The case of *Godolphin v. Tudor* is not in point. The officer here is the mere nominal possessor, and, substantially, has sold his office. *Blackford v. Preston*, 8 T. R. 89; *Parsons v. Thompson*, 1 H. Bl. 322, and *Osborne v. Williams*, 18 Ves. 379, show in what light contracts of this nature viewed both at law and in equity. In *Harrington v. Kloprogge*, (b) the office, the profits of which the court held might be well assigned, was only that of *private secretary* to Lord Holderness. [*678]

**Lawes*, in reply. *Godolphin v. Tudor* decides, that an officer has a right to dispose of the profits of his office. If an officer may dispose of the profits to his deputy, he may, also, assign them to his creditors. [*679]

Cur. adv. vult.

The following certificate was now sent:

This case has been argued before us by counsel. We have considered it, and are of opinion, that the assignment of the income, emoluments, produce,

(a) *Flarty v. Odlum*, 3 T. R. 681.

(b) The reporters are indebted to the kindness of Mr. Serjeant *Lens* for the following MS. note of the case.

(K. B. MICHAELMAS, 25 GEO. 3.)

HARRINGTON v. KLOPROGGE.

An assignment of the profits of all the offices of trust commissions, &c. which the defendant may acquire is good, as to all offices which may be legally assigned, by way of indemnifying the plaintiff, who has paid money for the defendant.

ACTION on bond for payment of 1200*l.*; oyer craved, and the condition appeared to be, that the plaintiff had joined in a bond with the defendant, to one Newman, for 1200*l.*, to secure the payment of an annuity of 100*l.* to Newman, during the life of the defendant. That the money given for the annuity has been paid to the present defendant, and in order to indemnify the plaintiff against the consequence of becoming security, it was agreed, that the profits of the place of the defendant, as *secretary to Lord Holderness*, should be assigned, and that, whenever the defendant should become possessed of any office of trust, commission, place or pension whatever, he should assign such office, &c. to the plaintiff, who was to take the whole profits: and for the performance of this agreement, the present bond was given. The plea then averred, that the defendant, since the bond, had been *private secretary* to Lord Holderness: and that all the money received by him in that place, was paid by the defendant to the plaintiff, and that defendant never had any other place.

Replication denied the receipt of the money as stated in the plea; and alleged that plaintiff had been obliged to pay Newman a certain sum.

Demurral by defendant, and issue on the payment.

Morgan, for the defendant, made two objections to the validity of the agreement. First, that it was illegal and void by stat., being for the purpose of assigning all offices, &c.; and that to assign an office of trust was illegal. Second, that, by the common law, offices of trust could not be assigned.

Lord MANSFIELD, without hearing the other side; there is nothing in the objection. The agreement is for the assignment of all offices, and is good *as to all offices which may legally be assigned*. The profits arising from this office of *private secretary* to Lord Holderness might be assigned; and as to all others, they are not within the present case.

Judgment for plaintiff.

See 3 Co. 83 a.

and profits of the office or place of clerk of the peace for Westminster, after deducting the salary or allowance of the deputy for the time being, of the defendant, Thomas Wright Vaughan, in the said office by the said defendant, Thomas Wright Vaughan, to the plaintiffs, George Palmer and William Loaden, by the indenture in the pleadings mentioned, dated the 25th day of January, 1806, is not a good or effectual assignment, nor valid in the law.

And that the said George Palmer and William Loaden are not entitled legally and of right to receive and take the income, profits, and emoluments, and produce of the said place or office, under and according to the true intent, meaning, and effect of the said deed of assignment, upon and subject to the trusts, intents, and purposes therein expressed and declared of and concerning the same.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

J. RICHARDSON.(a)

May 31st, 1821.

(a) See also *Hanington v. Du Chatel*, 1 Bro. C. C. 124; *Lidderdale v. Duke of Montrose*, 4 T. R. 428; *Garforth v. Fearon*, 1 H. Bl. 327; *Lowfield's case* and *Bristow's case*, 1 Atk. 212.

A lessee took a farm under an agreement, which he never signed, and the terms of which his lessor, in a material point, failed to fulfil. In an action for the use and occupation of the farm, Held, that the jury might ascertain the value of the land, without regarding the amount of rent reserved by the agreement.

THE defendant took a mansion-house and farm of the plaintiff, under an agreement, by which the plaintiff agreed, among other things, that the defendant should have the exclusive right of sporting over the manor within which the farm lay, and should occupy the glebe land of the parish. The rent to be paid was 450*l.* This agreement, though acknowledged and recognised, was never signed by the defendant; but he occupied the farm for some time. The defendant's chief inducement to take the farm was the promised privilege of an exclusive right to sport; but it turned out that the plaintiff (not being the owner of all the lands in the manor, nor having free warren) had no power to grant any such privilege, and the defendant was in fact warned off by the several occupiers within the manor. The plaintiff also failed in procuring the glebe for the defendant's occupation, and for this he offered to make a proportionate abatement of the rent. The defendant, being sued in an action for use and occupation, for 450*l.*, one year's rent, as reserved by the agreement, paid 350*l.* into court, and proved the foregoing facts at the trial before DALLAS, C. J., at the London sittings after last Hilary term, when the jury found a verdict for the defendant, considering 350*l.* to be the annual value of the land, independently of the glebe and the privilege of sporting.

Vaughan, Serjt., on a former day, obtained a rule *nisi* for a new trial, on the ground that the agreement, though not signed, having been acknowledged by the defendant's occupying the land, he must be bound by it as to the *quantum* of rent, under the 11 Geo. 2, c. 19, s. 14; that the value of the land being ascertained by *the rent reserved in the agreement, the jury were not at liberty to find any other value; and that, with respect to the plaintiff's failure to procure the exclusive privilege of sporting, the defendant might obtain redress in a cross-action.

Pell, Serjt., in showing cause against the rule, contended, that as the defendant never signed the agreement, nor had ever attained under it the chief object which he proposed to attain, the agreement must be considered a nullity as far

as regarded him ; and then, the plaintiff being entitled to sue for nothing but the unascertained value of the land, the jury were at liberty to ascertain and decide what that value was.

Taddy and Vaughan, Serjts., in support of the rule, argued that the defendant was bound by the agreement, though he never signed it, because he had taken a benefit under it, Co. Litt. 231 a : if so, the action being on the agreement, the jury could not travel out of it ; and the failure to afford the sporting privilege was no bar to the action, because it did not go to the whole consideration.

The court were of opinion, that an agreement between lessor and lessee was only evidence of the amount of rent to be paid, where the lessee had enjoyed under such agreement ; that the lessor in the present instance, having failed to fulfil the agreement in the chief object which had induced the leasee to propose becoming a party to it, the lessee could scarcely be said so to have enjoyed ; but that, at all events, the defendant in an action for use and occupation, as in an action of debt for rent, might show an eviction of the whole or of part ; that, in case of an "eviction of part, the jury must ascertain, independently of [*682] any agreement, what the defendant ought to pay ; and that an eviction of part of the subject-matter of the demise (namely, of the exclusive privilege of sporting) having been clearly proved in the present instance, the rule for a new trial must be

Discharged.

WILLIAM DUNCAN v. SAMUEL HILL, RICHARD HILL, HENRY WRIGHT, and GEORGE BOLTON MAINWARING.

The plaintiff declared on three bills of exchange, in three several counts ; but, according to his particular, only sought to recover on the bill set forth in the first count. The defence being, that the defendants were not partners when the bill set forth in the first count was drawn, the plaintiff tendered in evidence the other two bills, for the purpose of establishing the fact of the partnership : the evidence having been rejected, on the ground that these bills were not included in the particular, the court granted a new trial.

In this case, which was tried before DALLAS, C. J., at the London sittings after Hilary term, a verdict having been found for the defendants,

Lens, Serjt., on a former day, obtained a rule *nisi* for a new trial, on the ground that admissible evidence had been excluded.

Taddy and Lawes, Serjts., having subsequently shown cause against the rule,

DALLAS, C. J., now delivered the judgment of the court.(a) This is an action on three several bills of exchange, each being the subject of a distinct and separate count. The first count was on a bill for 1200*l.*; the third count on a bill for 403*l. 6s. 6d.*; and the fifth count on a bill for 407*l. 17s. 9d.* The defendants applied for a particular of the plaintiff's demand, which [*683] particular was in these words : "This action is brought to recover principal and interest, and expenses due for, and in respect of, the bill of exchange in the first count of the declaration mentioned, and the plaintiff will avail himself of all the counts of the declaration for recovery thereof." On the trial of the cause, the two Hills having suffered judgment by default, and the two defendants, Wright and Mainwaring, having pleaded the general issue, after the evidence had been given as to the first bill, the plaintiff offered in proof the two other bills, which were objected to by the defendants. No evidence was offered to connect the two last bills with the first, as given in payment of a sum remaining due on that bill, or as connected with it in any way whatever, except

(a) The facts of the case, and the arguments on both sides, are so sufficiently stated in the judgment that it was deemed unnecessary to repeat them.

as after mentioned; and, with the exception of the two Hills, who were the drawers of the first bill, and the acceptors of the two latter, the parties were different on the face of the bills. But the purpose for which it is said they were offered in evidence was this: The defence set up was, that Wright and Mainwaring, who had originally been partners in the stone pipe company, on whose account these bills were stated to have been drawn, had ceased to be so, or were not proved to be such, when the first bill was drawn; and that Samuel Hill and Co. was the firm of the house of the two Hills, carrying on, as wine merchants, a separate trade, to which character these bills might be referred; and, to rebut this defence, these two bills are alleged to have been offered in evidence, to show a continuation of the partnership at and subsequent to the time when the first bill for 1200*l.* was drawn, the two latter bills being of a subsequent date, and dated at the same place with the former bill, where the business of the stone pipe company was carried on.

*684] *It has been stated, on the part of the defendants, that the two bills were only offered in evidence in support of the counts, in which they are stated as substantive causes of action; and it is agreed on both sides, that, if so offered, they were properly excluded. But the fact has been correctly stated on the part of the plaintiff, namely, that they were offered as auxiliary evidence only, and in the manner I have stated; and it is equally true that, so offered, I did not receive them, considering them as excluded by the particular, and therefore objected to by the defendants.

I thought that the plaintiff, having expressly declared on three bills, but, by his particular, having confined his right to recover to one bill only, the defendants had no reason to apprehend that the two bills would be given collaterally in proof, under the general notice; but that, by all the other counts, was to be understood the common counts, as in the usual way. Supposing no counts had been on the two bills specifically, I should have had no doubt that they might be received as auxiliary evidence, under the common counts; but the peculiarity consisted in their having been originally declared on as distinct and substantive causes of action, and, by the particular, abandoned as such.

My brothers, however, are of opinion, that, under this particular, the plaintiff had a right so to apply the two bills; and with this opinion, on final consideration, I agree; and the more especially for this reason, that it appears to me that I ought, at all events, to have received the bills in evidence. If admitted, and they had weighed nothing, they would then have left the case where it was; and, if they had weighed any thing, the defendants might have moved the court, as may be done in such a case, on an affidavit, stating that they had

*685] been misled by the particular, as framed, in which case *the sufficiency of the particular would have been before the court; and, if at all doubtful, the defendants would have been let in to try. But, taking the other way, were a plaintiff to be shut out by a strict construction, he might be concluded by a particular fairly meant, but doubtfully worded, against the justice of his case. At any rate, there can be no mistake, nor any surprise on the defendants in future; as, what has passed, and is now passing, will operate as the fullest notice how the bills are to be applied.

I have said this much in a case that would not have required it, if there had not been a difference of assertion, with respect to facts, at the bar; and, therefore, with a view to a future trial, it is important that the parties should clearly know what is understood to have passed on the former occasion, and on what ground a new trial is now granted.

Rule absolute.

COLLYER v. MASON.

A. was seised of an estate for life; remainder to his sons, B., C., D. and E., in tail, in such shares and proportions as A. should appoint by will. In 1807, A., B., C. and D., conveyed the entirety of the premises to make a tenant to the *præcipe*, so that one or more recoveries should be suffered, in which A., B., C., D. and E. should be vouchees, for the purpose of barring all estates tail: a recovery was then suffered, in which B. and C. were vouched. In 1809, A., B., C., D., and E. conveyed all the premises to make a tenant to the *præcipe*, in a recovery which was suffered in 1810, in which E. was vouched: and, in 1811, a recovery was suffered, in which D. was vouched.

Held, that by these conveyances and recoveries the estates tail in B., C., D., and E. were well barred.

THIS was an action of *assumpsit* to recover the purchase-money of an estate sold by the plaintiff to the defendant, which action was defended on the ground of a defect in the title. The cause was tried at the *sittings after last Michaelmas term, at Westminster, before DALLAS, C. J., when a verdict [*686] was found for the plaintiff, subject to the opinion of the court, on a case in substance as follows.

Devise to Daniel Collyer for life, remainder to trustees to preserve, &c.; remainder to the son and sons of Daniel Collyer, lawfully to be begotten, in such shares and proportions as he should appoint by will, and the heirs of their respective bodies; remainder to the daughters of Daniel Collyer, as tenants in common in tail; remainder to Charles Collyer, for life, with divers remainders over. The devisor died, leaving Daniel and Charles Collyer him surviving.

Daniel had issue four sons, Daniel, John Bedingfield, William, and George. By indentures of lease and release, of 9th and 10th of February, 1807, Daniel the elder, Daniel the younger, John B., and William, for the purpose of barring all estates tail, conveyed the entirety of the premises to George Kinderley, as tenant to the *præcipe*, so that one or more common recovery or recoveries thereof should be suffered, in which George Kinderley should be tenant, William Domville demandant, and Daniel Collyer the elder, Daniel the younger, John B., William, and George, should be vouchees, who should vouch over the common vouchee; and then followed a declaration of the uses of the recovery. A recovery of the entirety of the premises was suffered, according to the above deeds, in Hilary term, 47 Geo. 3, in which Domville was demandant, Kinderley tenant, and Daniel Collyer the younger, and John B., vouchees. By indentures of lease and release, of the 3d and 4th November, 1809, Daniel Collyer the elder, Daniel the younger, John B., William, and George, for barring all estates tail, and for extinguishing the power of appointment vested in Daniel Collyer the elder, did, according to their respective estates and interests, convey to George Kinderley, all the *premises that he might become tenant to the [*687] *præcipe* in one or more recoveries in which the said George Kinderley should be tenant, William Domville demandant, Daniel Collyer the younger, John B., William, and George, vouchees, who should vouch the common vouchee, which recovery should enure to the same uses and purposes as were set forth in the deeds of 1807. In pursuance of these latter deeds, a recovery was suffered in Hilary term 50 Geo. 3, in which Domville was demandant, Kinderley tenant, and George Collyer vouchee, who vouched the common vouchee, of the entirety of the premises comprised in the recovery of Hilary term, 47 Geo. 3. A recovery was also suffered in Michaelmas term, 51 Geo. 3, in which Domville was demandant, Kinderley tenant, and William Collyer vouchee, who vouched the common vouchee, of the entirety of the premises comprised in the recovery of Hilary, 47 Geo. 3. Daniel Collyer died without executing the power of appointment limited to him by the will. The question for the opinion of the court was, whether, by the several deeds of the 9th and 10th February, 1807, and the 3d and 4th November, 1809, and the recoveries suffered in Hilary term, 47 Geo. 3, Hilary term, 50 Geo. 3 and Mi-

chaelmas term, 51 Geo. 3, the estates tail of the four sons of Daniel Collyer, the devisee for life, and the remainders over created by that will, were effectually barred. If the court should be of opinion that they were so barred, then the verdict found for the plaintiff was to stand; but if the court should be of opinion that they were not effectually barred, a verdict was to be entered for the defendant.

The case was argued on a former day in this term.

Bosanquet, Serjt. The objection to this title is, that the entirety of the estate [in question having passed out *of the tenant to the *præcipe* by the two first recoveries, the tenant to the *præcipe* in the last recovery had no estate at all; and so that recovery was void, and the estates tail not sufficiently barred. But a recovery is only a contrivance of law, to enable a tenant in tail to convey what he could not otherwise convey, and, beyond what is necessary for effecting such a purpose, the court will not apply to a recovery all the strict rules which govern real actions in other cases. This doctrine is laid down by Lord KENYON, in *Doe dem. Crow v. Baldwere*, 5 T. R. 112, by LEE, C. J., in *Martin v. Strachan*, Ibid. in notis, and in Pigott, p. 26, ed. 1739. If several are joint-tenants in tail and one is vouched, the recovery will operate on the share to which he is entitled, and not on the interest of the others. *Marquis of Winchester's case*, 3 Rep. 1; *Iseham v. Morrice*, Cro. Car. 109; Com. Dig. *Estate*, K. 8; Pigott, 109. So that William's interest did not pass out of the tenant to the *præcipe* on the two first recoveries; and where a conveyance consists of various parts, of which a recovery or recoveries form one, and the various parts are complete at different times, the court will consider the whole conveyance as one assurance, and support it accordingly. *Cromwell's case*, 2 Rep. 69; *Dowman's case*, 9 Rep. 8; *Havergill v. Hare*, 3 Bulst. 256; *Doe dem. Odiurne v. Whitehead*, 2 Burr. 710; *Lord Anglesey v. Lord Altham*, Salk, 676. Unless the law were so, the conveyance by the wife in the last case would have conveyed no estate, and the fine would have been inoperative, for the same reason as the recovery is contended to be inoperative in the present instance.

**Lens, Serjt., contrâ.* The principles laid down and the cases cited [on the other side, may all be admitted, but they do not apply to the present case, which is not the case of one conveyance consisting of various parts: but the last recovery is of itself a separate and distinct conveyance, and intended to be so: and then the previous recoveries having prevented the possibility of there being any estate in the last tenant to the *præcipe*, this is an ineffectual attempt to complete what was intended. The doctrine that a recovery can affect only the estates of those who are vouched, may apply where several parties have each a separate fractional interest, but that is not the case here. (*Seymor's case*, 10 Rep. 95, was cited.)

Bosanquet, in reply, contended, that the doctrine applied equally to the present case.

DALLAS, C. J. This was an action of *assumpsit*, brought upon a contract for sale of an estate, which was defended on the ground of a defect in the plaintiff's title. On the trial, a verdict was found for the plaintiff, subject to a special case. (Here his lordship stated the substance of the case.) The objection to the title, which has been insisted upon in the argument on behalf of the defendant is this: that the recovery last suffered, in which William Collyer was the vouchee, had no operation to bar his interest as tenant in tail; because, it is said, that, at the time when that recovery was suffered, George Kinderley, the tenant to the *præcipe*, had no estate remaining in him; for it is contended, that the whole of the estates which were conveyed to him by the deeds of 1807 and 1809 respectively, were respectively divested and taken out of him [by the *recoveries before suffered in pursuance of those conveyances.]

**690] The general principles applicable to fines and common recoveries, considered as recognised modes of conveyance, appear to be settled by num-*

rous cases, many of which have been cited at the bar. In the language of the Lord C. J. WILLES, in delivering the opinion of the judges in the House of Lords in *Martin dem. Tregonwell v. Strachan*, 1 Willes' Rep. 448, 451, "they are to be considered as common assurances only, and not at all the real transactions." "They are conveyances on record, invented to give a tenant in tail an absolute power to dispose of his estate, as if he were tenant in fee-simple." The intent of the parties is the principle on which their operation is to be construed. It is admitted that, if the sons of Daniel Collyer, the tenant for life, had each had a distinct fractional interest as tenants in tail in remainder, (for example, if each had been tenant in tail in remainder in one undivided fourth part,) then the recoveries in which they were respectively vouched, though purporting to be levied of the entirety, would only have operated on their respective fractional interests, and would not have divested the tenant to the precipice of the remaining fractional parts of the freehold, to which the interest of the vouchees did not extend.

Now we are of opinion, that the same principle applies to the recoveries which have actually been levied. For, although the interest of each of these tenants in tail was of a peculiar kind, and, in a certain sense, may be considered as extending to the entirety; yet it did not exhaust the entirety; but still left an interest in each of the others, who were not vouched. This interest of the others was not intended *to be affected; and, we think, was not affected; and, consequently, that an estate of freehold, coextensive with such unaffected interests, remained in the tenant to the precipice, and was sufficient to support and give validity to the last recoveries. [*691

Judgment for the plaintiff.

ANN STAFFORD v. HAMSTON.

The decree of the commissioners of sewers is not conclusive against a party residing within the district over which they preside; but such party may prove, in an action brought against a defendant for taking his goods to satisfy the rate, that he derives no benefit from the sewer on account of which he is rated.

TRESPASS for taking goods the property of the plaintiff, and detaining the same until she paid a sum of money in order to regain the possession of them. The defendant pleaded, first, the general issue. Secondly, a general justification, under the authority of the commission of sewers, in force at the time when, &c., and that the property was taken as a tax assessed by the said commission, and according to the statute of sewers, 23 H. 8. Thirdly, a justification, in substance the same, under 52 G. 3. Fourthly, a justification under the authority of the commission of sewers, in force at the time when, &c., the stat. of sewers, 23 H. 8, and the several other statutes relating to sewers. Replication to the special pleas *de injurid.*

At the trial before DALLAS, C. J., at the sittings after last Michaelmas term, the jury found a verdict for the plaintiff, with nominal damages, subject to a case, of which the following is the substance: The plaintiff is the owner of and resident in a house adjoining the high road, Knightsbridge, in the parish of St. Margaret, in the city of Westminster; the defendant is one of the collectors of the commissioners of sewers for the district in which the plaintiff's house is situate, and took the *goods which are the subject of the action, [*692 as a distress, by virtue of a warrant duly executed by such commissioners, who had holden a commission of sewers for the city and liberty of Westminster and precincts of the same, and for the parish (among others) of St.

Margaret, Westminster, on the 8th August, 1817, at which the jury presented, among other things, that theretofore the commissioners had laid out and expended divers sums of money in cleansing, embanking, and repairing a sewer in the parish aforesaid. And that the charges thereof, and also the charges of all other works and of all incidental expenses necessarily incurred and to be incurred in and about the said sewers, ought to be borne, paid, and defrayed by the several persons, owners or occupiers of messuages, lands, &c., whose rain and waste waters descending, issuing and falling, have passed and ought to pass through the said common sewer into the river Thames proportionably, and according to their respective interests in the said messuages, &c. &c., and to the several yearly rents and profits thereof, as the said several rents and profits were thereinafter added to the respective names of the respective owners or occupiers, in three separate and distinct levels: and in the first level, (the parish of St. Margaret, Westminster,) the plaintiff was rated at 300/-.

The court of sewers then made a decree, by which it was adjudged that a rate or assessment be charged upon the several lands, messuages, &c. *within the district of, or receiving benefit from the said sewer*, mentioned and comprised in the said presentment, at 6d. in the pound.

In the year 1819, another presentment, decree, and rate, was made, similar to the above.

These several presentments, decrees, and rates, being proved, and also that *693] the plaintiff's house was within *the district comprised in them, and that she had refused payment of the sum rated, after due notice and demand, the plaintiff offered evidence to prove that she derived no benefit whatever from the sewer in question.

The defendant objected to the admission of such evidence, on the ground that, as the plaintiff's house was situate within the district to which the jurisdiction of the commissioners of sewers for the city and liberty of Westminster is extended by the statute 47 G. 3, c. 7, she was liable to the rate, and that the presentment and decree were conclusive against her.

The question for the opinion of the court was, whether such evidence were admissible. If the court should be of opinion that such evidence was admissible, a new trial was to be had. If the court should be of opinion that such evidence was not admissible, a nonsuit was to be entered.

Hullock, Serjt., for the plaintiff. The evidence which had been objected to, is admissible. Independently of the maxim, *qui sentit commodum debet et onus sentire*, it is clear from stat. 23 H. 8, c. 5, and *Keighley's case*, 10 Rep. 139, that, even within the district which they superintend, the commissioners have jurisdiction only over persons who derive benefit from the sewer. The *usus rei*, the suffering inconvenience from the want of a sewer, or benefit from its construction, are the only grounds on which liability to taxation is incurred. Callis, 120, 125, 129, 148, 151, 222, ed. 1685. In *Masters v. Scroggs*, 3 M. & S. 447; *Dore v. Gray*, 2 T. R. 358, and *Netherton v. Ward*, 3 B. & A. 21, the question was, not whether the party taxed was liable because he lived within the district of the commissioners, but whether he derived benefit from the sewer. The very language of the presentment shows, *that the *694] defendants have exceeded their jurisdiction, the jurors presenting, that the charges incurred ought to be borne by the owners, whose rain and waste waters have passed through the sewer. If this be so, owners ought to have some opportunity of showing whether they have received benefit by the sewer or no; but unless the evidence contended for be admitted in actions by and against the commissioners, owners will have no opportunity of doing this. Even the consent of parties will not confer jurisdiction where the proceeding is *coram non judice*. *Brown v. Compton*, 8 T. R. 424. The 47 G. 3, c. 7. does not give the commissioners jurisdiction over persons who derive no benc-

fit from the sewer, but merely defines the limits within which the commissioners shall have jurisdiction over persons who do receive benefit. The 52 G. 3, does not touch the question.

Taddy, Serjt., contra. The plaintiff, residing within the district, is liable to the sewer rate on that ground alone, and the court cannot go on to inquire whether she derives benefit from the sewer or not. The greatest inconvenience would ensue, if in all cases the commissioners were to be put upon showing a particular benefit; for though a drainage be a general benefit, it may be difficult to show that a given individual has made use of the easement. The writs and statutes conferring jurisdiction on the commissioners are all in the disjunctive, giving power either over those who reside within the district of the commissioners, or those who suffer inconvenience from the want of a sewer, and benefit from its erection. *Registrum Brevium*, 127, *De Walliis, fossatis, etc.*, 23 H. 8, c. 5, &c. It may therefore be admitted, that where a party who resides out of the district of the commissioners is charged, benefit ought to be shown. This *was the case in *Masters v. Scroggs*, and *Dore v. Gray*: and it is [*695] to such persons only, that Callis' doctrine of the *usus rei* can properly be applied. *Netherton v. Ward* does not affect the defendants, the question in that case being only, whether a tenement in the king's dock yard was rateable.

Hullock, in reply. The commissioners are not required to show a benefit accruing to the party assessed; it is the party who claims the right of showing that she enjoys no benefit, if such be the fact.

Dallas, C. J., now delivered the judgment of the court. In this case it will not be necessary to go into a great deal that has been brought forward at the bar. The question submitted by the case is merely this. Ought the defendant to have been admitted to prove what she offered evidence to establish, viz. that she derived no benefit from the sewer, in respect of which the assessment was made? And to this point the present conclusion is confined. The commissioners are only to assess those, who receive, or who are likely to reap profit, or who have, or may have hurt, loss, or disadvantage; or, as is stated by the court in *Masters v. Scroggs*, "It ought to appear, that the party receives, or is likely to receive a benefit." This being clearly the ground of jurisdiction, it is not necessary to consider, with reference to the present purpose, how the common law originally stood, or what alteration different statutes have made from time to time, which may, upon many occasions, lead to very important questions.

Dore v. Gray, 2 T. R. 358, was an action of trespass for taking the plaintiff's goods; the defendant pleaded the general issue, and a justification under the commissioners *of sewers, and, on a case reserved, it was stated, [*696] that the rate was regularly made if the commissioners had jurisdiction, and whether they had or not, was deemed by Mr. Justice BULLER to depend on the fact, whether the party derived benefit, or was likely to derive benefit from the sewing: and it being found as a fact, that the plaintiff might have sustained disadvantage, if the works had not been done, the commissioners were held to have jurisdiction, and the defendant had judgment accordingly. *Masters v. Scroggs*, 3 M. & S. 447, was also an action of trespass with a similar justification, and the point decided was, that the commissioners of sewers cannot assess a person in respect of drains, which communicate with other drains that fall into the great sewer, if the level of his drain is so much above the sewer, that the stopping of it could not possibly throw back the water, so as to injure his premises, and, if he be not, and it does not appear, that he is likely to be benefited by the works done upon the sewer. In the present case, the plaintiff offered evidence to prove that she derived no benefit from the sewer in question. The case states, that this was objected to, on the ground that

the plaintiff's house was within the district comprised in the decree, and that the presentment and decree were conclusive against her. But this depends on the question of jurisdiction ; and the commissioners cannot conclude the party without allowing her an opportunity of being heard. To this point, the two cases to which I have referred fully go ; for, if the assessment had been conclusive, a case could not have been reserved finding a fact, so as to raise on such fact the question of jurisdiction for the opinion of the court, namely, as in *Masters v. Scroggs*, that the party received no benefit ; which necessarily implies, that such evidence is admissible, and that it was received at the trial. These cases are incompatible with the ground of objection made in this case to the evidence, namely, that, being within the district was sufficient ; for such was the case in *Masters v. Scroggs*, in which the assessment was by the commissioners for the limits of Holborn, and the plaintiff's house was situated within the division of Holborn. In both these cases, therefore, it is taken for granted that such evidence is admissible ; and, on the general sense and reason of the thing, it appears equally to be so. In some stage or other, the party, who is to bear a burden, on the ground that he derives, or is likely to derive a benefit, or is in danger of taking some hurt, ought to have some opportunity of showing, that no benefit is or can be derived, or hurt sustained. This he has not before the presentment is made, nor while it is making, nor before the decree ; nor has he any notice of the presentment or the decree, but by the assessment and notice of such assessment or demand under it. The effect, therefore, of rendering the presentment and decree conclusive, would be to decree against the party unheard, and without allowing him any possibility of being heard. On general principles this would be unjust ; but it is enough to state the cases referred to, in order to show, that the assessment is not considered as conclusive. This is fortified by the statute of H. 8, by which it is provided, that, if any action of trespass shall be brought against any person for taking any distress, or doing any other act of authority of the commission, or by authority of any laws or ordinances made by virtue of the commission, the defendants in such actions shall and may make avowry, cognisance or justification for such taking or other act, alleging in such justification, that the said distress, trespass, or *other act was done by the authority of the commissioners, (as by reference to the statute will more fully appear,) whereupon the plaintiff shall be admitted to traverse such cause so alleged, and the issue shall be tried by the verdict of twelve men, and not otherwise, as is accustomed in other personal actions ; and, on the trial of the issue, the whole matter shall be given by both parties in evidence, according to the truth of the same. The result, therefore, in this case is, that there must be a new trial.

Rule absolute.

JOHNSON v. BRAY.

An attorney of C. B., suing in that court by privilege, may, on a verdict for a sum under 5*l.*, have, by reason of his privilege, judgment and execution for costs ; notwithstanding the debt for which he sues is recoverable, under the 47 G. 3, c. 37, which enacts, that "if any action shall be commenced in any other court for a debt not exceeding 5*l.*, and recoverable by virtue of that act in the Court of Requests established thereby, the plaintiff, by reason of a verdict for him, shall not have any costs."

HULLOCK, Serjt., in Hilary term, obtained a rule, calling on the plaintiff, an attorney of this court, to show cause why he should not be restrained from taking out judgment and execution for costs in this cause, (*assumpsit* brought

by attachment of privilege in this court,) in which the plaintiff obtained a verdict for no more than 1*l.* 11*s.* 6*d.* The motion was made on the ground that the defendant resided within the jurisdiction of the Elloe and Kerton court of requests. (a)

Vaughan and *Pell*, Serjts., resisting the rule, on the ground that the plaintiff, as an attorney of this court, *was privileged to sue here, cited *Board v. Parker*, 7 East, 47; *Tagg v. Madan*, 1 B. & P. 629, and *Parker v. Vaughan*, 2 B. & P. 29.

Hullock, in support of the rule, urged that *Board v. Parker* was decided on a different act of parliament, the particular language of which, in the opinion of Lord ELLENBOROUGH, excluded attorneys plaintiffs; and that the other cases were not applicable to the present.

DALLAS, C. J. now delivered judgment. The motion made in this cause, on the part of the defendant, is founded on the statute of the 47 G. 3, c. 87, which is explanatory of a former act of the 15 G. 3, c. 84, intituled, "An act for the more easy and speedy recovery of small debts within the hundred of Elloe in the county of Lincoln," and extends the jurisdiction of the court of requests established for that purpose, to certain parishes in the hundred of Kerton, in the same county.

These acts enable a plaintiff to recover in actions of *assumpsit*, and in all causes founded on a *quantum meruit*, not exceeding five pounds. By the 13th section of the 47 G. 3, it is enacted, that, if any action or suit shall be commenced in any other court for a debt not exceeding the sum of 5*l.*, and recoverable by virtue of that and the former act in the court of requests established thereby, the plaintiff, by reason of a verdict for him, shall not have any costs.

The plaintiff's action of *indebitatus assumpsit* and on a *quantum meruit* was brought in this court. The venue was laid in the county of Lincoln, and he has obtained a verdict for 1*l.* 11*s.* 6*d.* only. My brother *HULLOCK* has obtained a rule calling on the plaintiff to show cause why he should not be restrained from taking his *judgment and execution for costs. The plaintiff's answer to the motion is, that he is an attorney of this court, and [700] that he has sued in this cause by attachment of privilege.

We are of opinion, that this is a decisive answer to the motion. That an attorney has the privilege of suing as such by attachment of privilege in the court of which he is a minister there can be no doubt. This privilege is particularly recognised in the case of *Gardner v. Jessop*, 2 Wils. 42, where it is said to be allowed him for the sake of the court and the suitors. If he sues as an ordinary man by original, then he is to be considered as any other plaintiff. This was so held in *Tagg v. Madan*, 1 B. & P. 629, and *Parker v. Vaughan*, 2 B. & P. 29. This privilege may be taken away by the express words of an act of parliament, or by the construction of an act, in which express words are not to be found, as appears by the case of *Evans v. Jones*, 6 T. R. 500. There the plaintiff, an attorney, sued the defendant in Wales by attachment of privilege issued out of the Court of King's Bench for words spoken in Wales. He laid his venue in a Welch county, in order that he might have the benefit of the statute of 13 G. 3, c. 51, s. 1: he tried his cause at Hereford, being the next English county, and obtained a verdict for 5*s.* only. Lord KENYON, who tried the cause under that act, certified, that the defendant was resident in the dominion of Wales at the time of the service of the writ, and the Court of King's Bench, in Michaelmas term, 1795, ordered, according to the directions of the act, that a judgment of nonsuit should be entered. It was, certainly a sound construction of the act, that the plaintiff, who had the benefit of the act for the purpose *of trial, should be bound by the provision of it in other respects. [701]

(a) See 47 G. 3, c. 37, s. 13, *post.* in the judgment of this case.

There have been many other cases decided, by the superior courts, on the subject of an attorney's privilege. It is not necessary to cite any other than *Board v. Parker*, 7 East, 47. The principles on which we decide do not militate with the decision in that case. In that case, the plaintiff, an attorney in the Court of King's Bench, residing at Bath, did business there for the defendant, who resided within the city of London, and was liable to be sued in the court of requests there. He laid his venue in Somersetshire, and obtained a verdict for 4*l.* 19*s.* only. The court held, that, though the demand might have been recovered in the court of requests, yet, that the plaintiff was entitled to sue as an attorney in his own court; and was not compellable, under the 39 & 40 G. 3., to sue the defendant in the court of requests: Lord ELLENBOROUGH, in giving his opinion in that case, says, that attorneys, as defendants, are expressly by those acts made subject to the processes, orders, judgments, and executions of that court; and, therefore, he infers, that attorneys, plaintiffs, were not meant to be included. But it is manifest that, unless the attorney had a privilege to sue in his own court, and had a right to avail himself of it by suing as such by attachment of privilege, he would have been within the act. By the conclusion of his lordship's opinion, it is plain that he did not rely much on that ground.

We are of opinion that the rule must be discharged without costs.

Rule discharged accordingly.

Held, that a bond, in the condition whereof it was recited that the plaintiff was entitled to an interest in certain veins of coal for her life, and that she, by indentures of even date with the bond, had assigned such interest to the defendants, who, in consideration thereof, had agreed to pay her an annuity for her life, for the payment of which the bond was conditioned, did not require enrolment under stat. 23 Geo. 3, c. 141.

And that, in cases of fair and *bona fida* sale of landed property, whether freehold for life or leasehold for term of years, when the consideration, in part or in whole, is an annuity to be paid to the vendor, the consideration for granting the annuity being an estate in land, *bona fida* sold and conveyed, is not a pecuniary consideration, or money's worth, within the statute.

PELL, Serjt., on the 12th May, moved to enter a nonsuit in this case, on the ground that a bond on which the action was brought, ought, under the circumstances of the case (which appear fully in the judgment of the court) to have been enrolled under the 53 Geo. 3, c. 141.

DALLAS, C. J., on a subsequent day, delivered the following judgment.

This was an action on a bond, in the penal sum of 800*l.* By the condition it was recited, that the plaintiff was entitled to an interest in certain veins of coal for her life, and that she, by indentures of even date with the bond, had assigned such interest to the defendants, who, in consideration thereof, had agreed to pay her an annuity of 60*l. per annum*, and the bond was then conditioned for the payment of that annuity to the plaintiff for her life.

The defendants pleaded, that no memorial was enrolled according to the statute.

The plaintiff replied, that the annuity was granted for the considerations mentioned in the deeds, and not for money or money's worth, within the intent of the statute on which issue was joined.

*The cause came on to be tried before Mr. Baron GARROW, at the *703] last assizes at Monmouth, when a verdict was taken for the plaintiff, with liberty for the defendant to move to enter a nonsuit, if the court should be of opinion that such a bond as this requires enrolment.

The 2d section of the stat. 53 Geo. 3, c. 141, requires every memorial of an annuity enrolled in pursuance of the act to specify, among other things, "the pecuniary consideration or considerations for granting the same;" which words necessarily presuppose and require the existence of a pecuniary consideration to be so specified, and show that the statute does not apply to cases where no such consideration exists.

The form of memorial also given by the same section, in the column headed "Consideration, and how paid," specifies only pecuniary considerations, whether paid in money or in bank notes, or other notes or bills of exchange, as the case may be.

The 10th section declares, that the act shall not extend (amongst other things) "to any voluntary annuity or rent-charge, granted without regard to pecuniary consideration or money's worth," and from these words it has been argued, that the act applies to all cases where any thing valuable is given for the purchase of an annuity.

It is here that these words import, that "money's worth" may, in certain cases, be "a pecuniary consideration," within the meaning of the act, as, where the grantee pays for the annuity in part or in whole, by goods or merchandise, with a nominal or perhaps real value imposed upon them, to be converted into money by the grantor; and where the object of the grantor was to raise money, and such appears to be the real nature of the transaction, however it may be disguised.

But, considering the 2d and 10th sections together, and the intent of the legislature, as it is to be collected *therefrom, the court is of opinion, that the act does not extend to cases of fair and *bond fide* sale of landed property, whether freehold for life or leasehold for term of years, where the consideration in part or in whole may be an annuity to be paid to the vendor. In such cases, the consideration for granting the annuity being an estate in land *bona fide* sold and conveyed, does not appear to the court to be a pecuniary consideration or money's worth, within the meaning of the statute. [704]

Such appears to be the present case; and therefore my Brother *Pell* will take nothing by his motion.

Rule refused.

The same observations apply to *Harrison v. Smitheringale.* (a)

(a) In which *Blosset, Serjt.*, had, in this term, made a similar motion on a similar ground.

*705]

REGULA GENERALIS.

It is ordered, that in all country ejectments which hereafter shall be served before the escoin day, either of Michaelmas or Easter term, the time for the appearance of the tenant in possession shall be within four days after the end of such Michaelmas or Easter term, and shall not be postponed till the fourth day after the end of Hilary or Trinity term next respectively following.

R. DALLAS,
J. A. PARK,
J. BURROUGH,
J. RICHARDSON.

22d May, 1821.

END OF EASTER TERM.



AN
INDEX
TO THE
PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

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ACCEPTANCE.

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ADMINISTRATOR.

See ANNUITY, 2.

AFFIDAVIT TO HOLD TO BAIL.

See PRACTICE, 4, 5.

AGREEMENT.

Where A. entered into and signed an agreement, as agent of B., and B. shortly afterwards signed it with the words, "I hereby sanction this agreement, and approve of A.'s having signed it on my behalf." Held, that A. was not personally responsible. *Spittle v. Lavender*. 452

ANNUITY.

And see PLEADING, 3.

• The memorial of an annuity deed stated the consideration to consist of Bank of England notes payable on demand, and of a draft payable at a banker's without specifying the time when. The annuity had been paid eleven years, and the attesting witness and agent of the grantee were both dead. The court set aside the securities on the ground that the memorial did not state when the draft was payable, or whether it had been in fact paid. *Drake v. Rogers*. 19

2. Deed between B. J. B. and the defendant of the one part, and N. P. of the other part, by which B. J. B. and the defendant agreed with N. P. his executors and administrators, to pay him an annuity for 21 years, if B. J. B. and the defendant, or the survivor of them, should so long live; and if N. P. should die during the term without making any appointment of the annuity, to his child or children for the residue of the term; and if there should be no child, to the widow of N. P.

N. P. died within the term intestate, and without appointment, leaving M. E. P. an only child, who also died during the term intestate and without appointment. The wife of N. P. died during his life. Held, that the administrator of M. E. P. could not sue the defendant on this deed for non-payment of the annuity. *Barford v. Stuckey*. 333

3. Held, that a bond, in the condition where of it was recited that the plaintiff was entitled to an interest in certain veins of coal for her life, and that she, by indentures of even date with the bond, had assigned such interest to the defendants, who, in consideration thereof, had agreed to pay her an annuity for her life, for the payment of which the bond was conditioned, did not require enrolment under stat. 23 G. 3, c. 141.

And that, in cases of fair and *bona fide* sale of landed property, whether freehold for life or leasehold for term of years, when the consideration in part or in whole, is an annuity to be paid to the vendor, the consideration for granting the annuity being an estate in land, *bona fide* sold and conveyed, is not a pecuniary consideration, or money's worth, within the statute. *James v. James*. 702

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1. A replevin clerk, who is partner in an attorney's firm, must sue alone for the expenses of preparing a replevin bond, though it be prepared at the office of the firm. *Brandon v. Hubbard*. 11

2. An attorney of C. B., suing in that court by privilege, may, on a verdict for a sum under £1, have, by reason of his privilege, judgment and execution for costs; notwithstanding the debt for which he sues is recoverable, under the 47 G. 3, c. 37, which enacts, that "if any action shall be commenced in any other court for a debt not exceeding £1, and recoverable by virtue of that act in the Court of Requests, established thereby, the plaintiff, by reason of a verdict for him, shall not have any costs." *Johnson v. Bray.* 698

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1. The defendant, in an action on a bail-bond (given in an action of debt against himself,) becoming bankrupt between plea and verdict in the action on the bail-bond, and obtaining his certificate after judgment, is discharged from the damages and costs. *Dinodale v. Eamer.* 8
2. Held, that evidence of a dealing in hops was properly admitted in a cause brought to try the validity of a commission of bankrupt describing the Plaintiff as *dealer in cattle*, seeking his trade of living by buying and selling. *Hale v. Small.* 25
3. A trader assigned a ship to A. in trust to pay a debt due from the trader to A. and his partners, but, with their permission, retained the possession and disposition of the ship at the time of his bankruptcy: Held, that the ship passed to the assignees under the commission of bankruptcy, by virtue of the 21 J. 1, c. 19, s. 11, although before the act of bankruptcy the register was endorsed to A., and shortly afterwards (three months before the issuing of the commission) the ship was newly registered in his name, and continued so registered at the time the commission was issued.

The 21 J. 1, c. 19, is not repealed as to shipping, by the ship register acts. *Monkhouse v. Hay.* 114

4. In November, 1818, a commission of bankruptcy was issued against M. and Co., under which the defendants were appointed assignees. H., being indebted to M. and Co., had deposited with the defendants, as assignees of M. and Co.,

a promissory note; and, in January, 1819, paid this debt to the defendants as such assignees, who then delivered the note back to him. H. had, unknown to any of the parties, in May, 1818, committed an act of bankruptcy; and in May, 1819, a commission issued against him. In August, 1819, the commission against M. and Co. was superseded; and, in September, 1819, a new commission issued against them, under which the defendants were again chosen assignees. Between the superseding of the first commission against M. and Co. and the reappointment of the defendants as assignees under the second, the plaintiffs, as assignees of H., demanded of the defendants the sum which H. had paid to them as assignees of M. and Co. In an action by the plaintiffs as assignees of H. against the defendants in their own right, for the money received by them from H., the jury having found a verdict for the defendants, the court refused to grant a new trial. *Davenport v. Carter.* 317

5. An assessment for church and highway rates is a debt, and the assessor a creditor, under the bankrupt laws. *Lloyd v. Heathcote.* 388
6. If a trader gives a general order to be denied to all comers, this is sufficient evidence of a beginning to keep house with intention to delay creditors. *Ibid.*
7. A beginning to keep house with such intention, constitutes an act of bankruptcy, though no creditor is actually delayed.
8. Where the mortgaged estate of a bankrupt is sold under the order in Chancery of 8th March, 1794, at the request of the mortgagee, and the mortgagee is the purchaser at the sale, he is liable, in an action for money paid, to reimburse the solicitor under the commission the expenses of the sale. *Bosch v. Perrings.* 457

BILL OF EXCHANGE.*And see EVIDENCE, 20.*

If a bill of exchange be accepted, payable at a particular place, the declaration in an action on such bill against the acceptor, must aver presentment at that place, and the averment must be proved. *Rouse v. Young.* 165

BILL OF LADING.

Under a bill of lading, by which goods were to be delivered "to J. A., nett proceeds paid to H. T., as per advice, or to his assigns, he or they paying freight for the said goods as per charter-party:" Held, that the freight was to be paid by J. A., and that H. T. was only entitled to what remained after such payment. *Thompson v. Adams.* 450

BOND.*See ANNUITY, 3.***CHARTER-PARTY.**

By charter-party between defendant owner of a ship, and G. L. defendant granted and to freight let, and G. L. took and to freight hired the ship for the voyage. Defendant covenanted that the master should receive on board at London, goods to be sent along-side by G. L., and deliver them from along-side at Newfoundland according to bills of lading, there receive, and deliver at Demerara other goods, in like manner; and there, in like manner, receive other goods, and deliver them in the London dock, according to bills of lading; and that the ship's boats should assist in loading and unloading, so as the exclusive duties and operations of the ship should not be thereby impeded. In consideration whereof, G. L. covenanted to send and take from along-side goods, and to pay for the freight and hire of the ship for the voyage 2600*l.*, with primage, &c., one-quarter part thereof on delivery of goods at Newfoundland, by good bills at 60 days' sight on London, and the remainder by good bills at two months' date from the day of the ship's report inwards at the port of London. The voyage was performed, and goods of third persons brought from Demerara under bills of lading, deliverable to the consignees on payment of certain specified freights therein mentioned, which freights the defendant received, no bill for the three-quarters' freight per charter-party having been given or tendered to him, and a bill for one-quarter given at Newfoundland having been dishonoured: *Held*, (Dallas C. J. *dissentiente*), first, that, notwithstanding the words of grant, taking the whole charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner; and that as the freight per charter-party was to be paid to him by good bills, prior to the delivery of the homeward cargo, he had a lien thereon for such freight: secondly, that he had a right to receive the freight per bills of lading from the consignees, and had a like lien on such freight when so received. *Christie v. Lewis.* 410

CHURCH RATES.*See BANKRUPTCY, 5.***CLERK OF THE PEACE.**

An assignment to trustees of all the emoluments and profits which, during the life of A., and his continuing to hold the office of clerk of the peace, should arise or become due to him as clerk of the peace, or in respect of his office, after deducting the salary or allowance of his deputy for the time being, upon trust, to pay the in-

terest arising on certain debts due from A., and from time to time render the surplus and residue, after satisfying the trusts to A., is invalid. *Palmer v. Bate.* 673

CO-HEIRS.*See PLEADING, 11. LANDLORD AND TENANT, 6.***COMMISSIONERS.***See SHERIFFS.***CONSERVATORY.***See LANDLORD AND TENANT, 1.***CONSIDERATION.***See ANNUITY, 3.***CONSTABLES.**

Some constables, under a warrant to search a house for black cloth which had been stolen, finding no black cloth, took cloth of other colours, and carried it before a magistrate, refusing, at the same time, to tell the owner of the house searched whether they had any warrant or no: *Held*, that they were within the protection of the stat. 24 G. 2, c. 44: and that an action against them ought to have been commenced within six months after the grievance complained of. *Smith v. Wiltshire.* 619

CONTINGENT DAMAGES.*See GUARANTEE.***COVENANT.***See PLEADING, 9, 18. CHARTER-PARTY.
POWER.***CROSS-REMAINDERS.***See DEVISE, 3.***DEED.***See ANNUITY.***DETINUE.***See DEVISE, 4, 5.***DEVISE.***And see REPLEVIN, 1.*

1. The devisor, by will, left all his "real and personal estates" to his brother; by a codicil, reciting that since the making of the will his brother had died, and that devisor was possessed of a considerable fortune both real and personal, the devisor, after a devise to nephew J., left all his estates, lands, and tenements in H., F., and M. to his nephew, G. E., and other lands to nephews L. and C., respectively, none of them to come into possession till they were respectively of age; and if one or more of them should die before he or they come of age, the estate or estates of him or them so dying were then left to nephew J. and his issue, lawfully begotten; and if J. should die without issue,

to G. E.; and for default of such issue in G. E., to L. and his issue; and in default of such issue in L., to C. and his issue; and for default of such issue in C., to nephew S. and his issue; and for default of such issue in S., to niece K. and her issue, in such manner, and under such restrictions and limitations as she should think proper to dispose of the same among her issue, it being the intent of the will to prevent waste by making the several children of G. E. tenants for life only. *Power* for nephews marrying to make reasonable settlements on their wives, and to dispose of their respective estates among the issue of such marriages, in manner as they should think proper to limit and appoint the same. The residue not disposed of was left to nephews and niece, except S., to be divided among them, share and share alike, at their respective coming of age; and if any should die before that time, the share of the party dying to go to the survivors and survivor: *Held*, that G. E., under this will and codicil, took an estate for life in the lands in H. *Bruce v. Bainbridge*.

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2. T. M. devised lands to trustees, their heirs and assigns, until his nephew, J. R. M. W., son of his sister M. W., should attain 21; and if he should die in the mean time, until H. W., second son of M. W., should attain 21; and if H. W. should die in the mean time, until the daughter of M. W. should attain 21; in trust, to raise out of the rents, or by sale or mortgage, 2000*l.*, and pay the same to H. W., when he attained 21; and if M. W. should have more than one younger child, to raise out of the rents 3000*l.*, and pay the same among such younger children, share and share alike, when they should severally attain 21; and, upon further trust, to apply a proper sum out of the rents, for the education and maintenance of J. R. M. W. till he should attain 21, and then to pay him the residue of them, if any should remain after performance of the before-mentioned trusts; and and if J. R. M. W. should die before 21, then to apply a sufficient sum from the rents for the education and maintenance of H. W. till he should attain 21, and then to pay him the residue of the rents, if any should remain after performance of the before-mentioned trusts, and in the mean time to place out at interest, for the benefit of his nephews, the money arising from the said rents: and when J. R. M. W. should attain 21, or, in case of his death, when H. W. should attain 21, or, in case of his death, when the daughter of M. W. should attain 21, to the use of J. W. and his assigns, for life, *sans* waste; remainder to trustees, to preserve contingent remainders: and after the

death of J. R. M. W., to the use of the first, second, third, and all and every other son and sons of the body of J. R. M. W. lawfully issuing, severally, successively, and in remainder, according to priority of birth, and of the several and respective heirs male of his and their respective body and bodies lawfully issuing, the elder always to take before the younger, and the heirs male of his and their body and bodies issuing; and in default of such issue, to the first, second, and third, and all and every other daughter and daughters of the body of J. R. M. W. lawfully issuing, severally and successively, according to priority of birth, and of the heirs male of the respective body and bodies of such first and other daughters lawfully issuing, the elder of such daughter and daughters, and the heirs male of her and their body and bodies, always to take before the younger of them, and the heirs male of her and their body and bodies issuing; and for default of such issue, to the use of H. W. and his assigns, for life; *sans* waste; remainder to trustees, to preserve contingent uses and estates, and then to the use of his sons and daughters, in like manner as to the sons and daughters of J. W.; and for default of such issue, to the use of his niece, the daughter of M. W., and her assigns, for life, *sans* waste, and then to the use of her sons and daughters, in like manner as to the sons and daughters of J. R. M. W. and H. W.; and for default of such issue, to the use of M. W., in fee: Provided that whoever became possessed of the lands should take visor's name, and live in his house, otherwise the devise to be void as to the person refusing; his plate and furniture to remain in the house as heir-looms. T. M. died, leaving his sister, M. W., her sons, J. R. M. W., H. W., and three younger children, alive. J. R. M. W. married, and died under age, leaving a daughter, M. E. M. W.

Held, that on the death of J. R. M. W., M. E. M. W. became entitled to the lands devised, as tenant in tail male, subject to the annuities, &c.; that the heir-looms being personalty, vested in her at the same time, and that she was entitled to the possession of them; and, that the personal representative of J. R. M. W. was entitled to the savings of the rents and profits of the estates accrued in the lifetime of J. R. M. W., subject to the annuities, &c. *Warter v. Warter*. 349

3. Devise to three trustees of all his freehold, leasehold, and copyhold estates, and all his personal estate, in trust, to pay legacies and annuities (the annuities to be paid out of his 3 *per cent.* stock,) and all the rents, issues, profits, dividends interest, profits, and produce of the resi-

due of his estate and effects, to his three nieces, E. M., M. M., and C. M., share and share alike, for the term of their respective lives; and after the decease of them, or either of them, that the lawful issue of them, and each of them, should have his or her mother's share of such rents, &c. for life; and if either of the nieces should die in the lifetime of the other, without issue, the share of her so dying should be divided equally between the survivors of the nieces for their respective lives, and afterwards by the issue of the survivors of the nieces; and if all the nieces save one should die without issue, such one should have the whole for her life; and, after her decease, the issue of such niece, if more than one, should enjoy the whole, share and share alike; if but one, should enjoy the whole alone; such parts as were freehold to them, if more than one, their heirs and assigns, as tenants in common, and not as joint-tenants; if but to him or her, his or her heirs and assigns. If all the nieces should die without issue, the whole to go to devisor's next male heir of the name of M., his heirs and executors. M. M. married G. B., who died leaving M. M. and one son. C. M. married, but had no issue. Two of the trustees died. A large surplus of personal estate remained, after paying debts, legacies, and annuities. *Held.*

1st, That the surviving trustee had the legal estates in the freehold tenements devised.

2dly, That the nieces took no legal estate in the freehold tenements.

3dly, That the son of G. B. took no legal estate in those tenements, and would take none if he survived the three nieces.

4thly, That if the will had commenced with the words, "all the rents, &c.," and the passage before these words had been omitted, the three nieces would respectively have taken under the will, in the said freehold tenements, estates for life; with cross-remainders between them for life, in the event of one or two of them dying without lawful issue.

5thly, That the said G. B. would now have an estate in tail in remainder in his mother's one undivided third-part of the said freehold tenements, subject to be divested in part by the birth of other children of his mother, whether sons or daughters; and that he would have an estate in tail in the whole of the said freehold tenements, in the event of his being the only issue of the three nieces living at the death of the survivor of them, no other issue having been born. *Murthwaite v. Barnard.* 623

4. Devise of land to devisor's granddaughter, A. M., for life; remainder to trustees,

during the life of A. M., to support contingent remainders; remainder to all and every the children in tail, with cross-remainders between them in tail; and, in default of issue of all and every the children of the granddaughter, to devisor's daughter, B. C. M., for life; remainder to such one or more of the children of B. C. M. as B. C. M., by deed or will attested by three witnesses, should appoint for their lives; remainder to all and every the child and children of such daughter, or daughters, to be appointed by B. C. M., as aforesaid; and if only one should be appointed, to her and the heirs of her body; and if more than one should be appointed, all of them to take their mother's shares, *per stirpes*, as tenants in common, and not as joint-tenants; with cross-remainders between them, the children of such daughters, as to their mother's shares in tail; and on failure of such issue of any one or more of such daughters, with cross-remainders to the others of their issues; and, in default of appointment, and of any appointment not exhausting the whole fee, the land, or so much as should not be exhausted by appointment, to B. C. M. for life; remainder to all her daughters for their lives, with cross-remainders for life between them; remainder, during the lives of the daughters of B. C. M. and the survivor, to support contingent remainders; and, for default of issue of any or either of the daughters of B. C. M., to B. C. M. and her heirs.

A. M. died, sole and intestate, leaving B. C. M. her heir at law, and heir at law of devisor. B. C. M. has nine daughters, many of whom are married and have issue: *Held.*

1st, That B. C. M. has in the lands an estate for life, with an ultimate reversion to himself in fee.

2dly, That, in default of appointment, the daughters now living of B. C. M. have, respectively, in the lands estates for life in remainder, as tenants in common, with cross-remainders amongst themselves for life; with remainders to themselves in tail, respectively.

3dly, That, in default of appointment, the grandchildren of B. C. M. have no estate in the lands.

4thly, That, B. C. M. has power by appointment to designate which one, or more than one of her daughters, is, or are, to take under the will; that if more than one are designated, they will take under the will as tenants in common for life; with remainder to their respective children, as tenants in common in tail; with cross-remainders between them (the children of the appointed daughters,) in tail; such cross-remainders to take place, as well with regard to the shares of the

respective mothers as with regard to the shares of their aunts, in the event of a failure of issue of any of the aunts.

Medlycott v. Jortin. 632

3. A., on 17th July, 1812, made a will, by which he devised certain real estates to his wife for life; and on her death, to M. B.; and on the death of his wife and M. B., to his executors in fee, upon certain trusts. The will, which was attested by three witnesses, concluded by stating that A. had signed his name to the two first sides, and his hand and seal to the last side of the will, which was written on three sides of a sheet of paper. A. put his name and seal at the end of the will, but did not sign his name to the two first sides. In November, 1816, he made various interlineations and obliterations, the effect of which, as regarded his real estate, was to confine the first devise to his wife, to her widowhood, and to strike out the devise to M. B.; the original date was struck out and the day of November, 1816, was substituted. The will was never re-signed, re-published, or re-attested; but, in the following month, A. caused a fair copy of it to be made, and added one interlineation not affecting his real estate: but the copy was never signed, published, or attested. The will and fair copy were found locked up in a drawer at the residence of the testator, who died on the 24th December, 1816: *Held*, that the will was well executed; and that there was no revocation of it as it stood originally. *Winsor v. Pratt.*

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DISTRESS.

See PLAINTE, 1, 14. LANDLORD AND TENANT, 2, 3, 4, 5. POWER. REFLUVIUS.

EJECTMENT.

And see POWER.

1. In every action of ejectment, the defendant shall specify in the consent rule for what premises he intends to defend, and shall consent in such rule to confess upon the trial, that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was at the time of the service of the declaration, in the possession of such premises; and that if, upon the trial, the defendant shall not confess such possession, as well as lease entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case to be taxed. *Regula Generale.*

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2. In all county ejectments which shall be

served before the escoin day, either of Michaelmas or Easter term, the time for the appearance of the tenant in possession shall be within four days after the end of such Michaelmas or Easter term, and shall not be postponed till the fourth day after the end of Hilary or Trinity term next respectively following. *Regula Generale.*

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EVIDENCE.

And see REFLUVIUS, 1, 2. BANKRUPTCY, 2. BILL OF EXCHANGE. POWER. SEWERS.

1. An attorney, being requested to draw an assignment of goods, refused, and the deed was drawn by another. The validity of the deed being afterwards questioned, on the ground of fraud, in an action against the sheriff in which the attorney first applied to was not employed: *Held*, that the communication made to this attorney was professional, and that evidence of the fraud proposed to be given through him, was properly rejected. *Cromack v. Heathcole.*

4

Sed vide Wadsworth v. Hamstall.

5

2. Defendants were sued for the price of some growing trees, which they had purchased, cut down, and carried away; a witness proved an admission by one of them that something was due, and a promise to pay. At the time of the bargain, written memoranda had been made of the transaction; but these memoranda (one of them an item in a book of accounts,) being neither stamped nor signed with the names of the parties, were not produced in evidence, and the plaintiff was nonsuited: *Held*, that the nonsuit was proper. *Teal v. Audy.*

99

3. The commander in chief of the army, having directed an assemblage of commissioned military officers to hold an inquiry into the conduct of H., a commissioned officer in the army; and H. having sued the president of the inquiry for a libel stated to be contained in the report thereupon made: *Held*, that this report was a privileged communication; that it was properly rejected as evidence at the trial; and that an office copy of the same was also properly rejected. *Home v. Berdinch.*

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4. If a witness, without objecting to it, takes the oath in the usual form, he may be afterwards asked, whether he thinks the oath binding upon his conscience; but it is unnecessary and irrelevant to ask him, if he considers any other form of oath more binding, and such question cannot be asked. *The Queen's case.*

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5. It is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without

- having first shown the witness the letter, and having asked him whether he wrote that letter. *The Queen's case.* 286
6. Two or three lines of a letter may be exhibited to a witness, without exhibiting to him the whole, and the witness may be asked whether he wrote the part exhibited.
- But, if the witness deny that he wrote such part, he cannot be examined as to the contents of the letter. *Ibid.* *Ibid.*
7. If, on cross-examination, a witness admits a letter to be of his handwriting, he cannot be questioned by counsel whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read in evidence.
- In the ordinary course of proceeding, such letter must be read, as part of the cross-examining counsel's case. The court, however, may permit it to be read at an earlier period, if the counsel suggest that he wishes to have the letter immediately read, in order to found certain questions upon it, considering it, however, as part of the evidence of the counsel proposing such a course, and subject to the consequences thereof. *Ibid.*
8. If, on cross-examination, it is proposed to ascertain of a witness, whether he has made representations of any particular nature, immediately after being asked whether he made any representation, he must be asked whether he made the representation by word or in writing *Ibid.* 292
9. If, on the trial of an action or indictment, a witness examined on the part of the plaintiff or prosecutor, upon cross-examination by defendant's counsel, states, that at a time specified he told A. that he was one of the witnesses against the defendant, and, being re-examined by the plaintiff's or prosecutor's counsel, states what induced him to mention this to A., the plaintiff's or prosecutor's counsel cannot further re-examine the witness as to such conversation, even as far only as it related to his being one of the witnesses: by eight judges against one (Best, J., *dissentient*) and confirmed by the House of Lords. *Ibid.* 294
10. If a witness examined in chief on the part of the plaintiff, being asked whether he remembers a quarrel taking place between A. and B., answer, that he has heard of a quarrel between them, but does not know the cause of it, and such witness be not asked, upon his cross-examination, whether he has or has not made a declaration stated in the question touching the cause of the quarrel, the counsel for the defendant cannot, in order to prove such witness' knowledge of the cause of the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration to him touching the cause of such quarrel. *The Queen's case.* 299
11. If a witness examined in chief on the part of the plaintiff, being asked whether he remembers a quarrel taking place between A. and B., answer, that he does not remember it, and such witness be not asked, on his cross-examination, whether he has or has not made a declaration stated in the question respecting such quarrel, the counsel for the defendant cannot, in order to prove that such witness must remember the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration. *Ibid.* 299
12. If, on the trial of an indictment for any crime, evidence has been given upon the cross-examination of witnesses examined in chief in support of the indictment, from which it appears that A. B. (not examined as a witness,) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine C. D. as a witness to prove, that A. B. has offered a bribe to E. F. in order to induce him to give testimony touching the matter in the indictment, (E. F. not being a witness examined in support of the indictment, nor examined before it was so proposed to examine C. D.) *Ibid.* 302
13. If, in the trial of an indictment for any crime, evidence has been given upon the cross-examination of witnesses examined in chief in support of the indictment, from which it appears that A. B. (not examined as a witness,) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine G. H. as a witness to prove that A. B. has offered him a bribe, to induce him to bring to A. B. papers belonging to the party indicted, (G. H. not having been examined as a witness in support of the indictment.) *Ibid.* 299
14. On a prosecution for a crime, the proof whereof is supposed to consist wholly or in part of evidence of a conspiracy entered into by the party then indicted, and under trial, so that the conspiracy is to be given in evidence against him,—general evidence of the existence of the conspiracy charged, may be received in the first instance, though it cannot effect such defendant, unless brought home to him or to an agent employed by him. *Ibid.* 299
- The same rule applies, if a defendant seeks by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of his defence, provided the proposed evidence be previously

- opened to the court, as in the case of a prosecution to be proved by conspiracy. *The Queen's case.* 299
15. When a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution, it is not competent to the party accused to examine witnessess in his defence to prove such declarations or acts, without first calling back such witness examined in chief to be examined or cross-examined as to the fact, whether he ever made such declarations or did such acts. *Ibid.* 311
16. If a witness is called on the part of a plaintiff or prosecutor, and gives evidence against the defendant or accused; and if, after the cross-examination of such witness, the defendant's or accused's counsel discover that the witness so examined has corrupted, or endeavoured to corrupt, another person to give false testimony in such cause, the counsel for the defendant or accused are not permitted to give evidence of such corrupt act of such witness, without calling back such witness. *Ibid.* 311
17. An assignee of a bankrupt who has released his individual claims on the bankrupt's estate, is an admissible witness to prove the petitioning creditor's debt. *Tomlinson v. Wilkes.* 397
18. A grant of wreck was made by Hen. 2, to the proprietors of certain lands on the coast, and confirmed by Hen. 8. The proprietors of those lands having, 40 years ago, with a view to reclaim sea mud, run an embankment across a small bay, which was used to be left almost dry at low water, and having ever since asserted, without opposition, an exclusive right to the soil of the bay, though the bank was forced by tempest: Held, that such usage was evidence whence anterior usage might be presumed, which, coupled with the general terms of the grant, served to elucidate it, and to establish the right so asserted. *Chad v. Tisbury.* 403
19. Where the lessees of a fishery had publicly landed their nets on the shore at A. for more than 20 years, and had, at various times, dressed and improved the landing place (both the fishery and the landing place having originally belonged to one person, but no evidence being offered to show that he, or those who under him owned the shore at A., knew of the landing of nets by the lessees of the fishery): Held, that it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery, by some former owner of the shore at A. *Gray v. Bond.* 667
20. The plaintiff declared on three bills of exchange, in three several counts; but, according to his particular, only sought to recover on the bill set forth in the first count. The defence being, that the defendants were not partners when the bill set forth in the first count was drawn, the plaintiff tendered in evidence the other two bills, for the purpose of establishing the fact of the partnership: the evidence having been rejected, on the ground that these bills were not included in the particular, the court granted a new trial. *Duncan v. Hill.* 682

EXECUTION.*See LANDLORD AND TENANT, 3, 4.***EXECUTOR.***See PLEADING, 1. PROMISSORY NOTE.***FACTOR.**

The circumstance of a principal's drawing bills on his factor to be provided for out of the proceeds of goods consigned, does not authorize the factor to pledge the goods: therefore, where A. consigned goods to B. for the purpose of sale, at the same time drawing bills to the amount of 1588*l.* 5*s.* 7*d.* on B., to be provided for out of the proceeds; and B. pledged the goods for 2500*l.* to C. (who knew that A. was the owner,) and paid 294*l.* in discharge of one of the bills; and C. afterwards sold the goods for B. for 4033*l.*; it was held, that A. was entitled to recover from C., in an action for money had and received, (in which 1533*l.* was paid into court,) the whole balance of 2500*l.* *Fielding v. Kynner.* 631

FIERI FACIAS.*See LANDLORD AND TENANT, 3, 4.***FINES AND RECOVERIES; PRACTICE OF PASSING.**

1. The court allowed a recovery to pass, where the certificate of the notary (that the party who made the affidavit of the caption and acknowledgment of the warrant of attorney was sworn in his presence before the deputy fiscal at Cape Town,) omitted the day and month in the body of the certificate, but stated it correctly at the end, where the notary witnessed the instrument; the date of the jurat of the affidavit being the same as that at the bottom of the certificate. *Hinde demandant. Hinde tenant. Blend touchee.* 7
2. In a recovery, the *principale*, warrant of attorney, and affidavit of caption were engrossed on *parchment*, and sent to certain commissioners at Rotterdam. The commissioners copied these instrument upon paper (in consequence of the refusal of the Dutch notary to certify upon

English documents, which the Dutch law would not allow him to do,) and returned them written upon *paper*, and stamped with a Dutch stamp, and certified by the Dutch notary. On a motion that the appearance of the tenant might be recorded, the warranty of the vouchees entered, and all other usual proceedings had, notwithstanding these documents were upon *paper*, the court unanimously rejected the application. *Taiham defendant.*

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3. The court allowed the writ of entry in a recovery suffered 56 G. 3, to be amended by altering the names of the parties, on affidavit that the recovery was intended to be suffered according to the amendment prayed, and that all the parties were living and consenting to the motion. *Edge defendant.* 98

4. By a deed to lead the uses of a recovery suffered in Trinity term, 1 W. & M., M. L. and E. L., conveyed to J. N., to make him tenant to the *præcipe*, all the manors and farms of B. and C., then in the occupation of M. L., her tenants and assigns, and all other the manors, messuages, services, rents, lands, tenements, and *hereditaments*, in the county of S. and isle of W. of them, M. L. and E. L., or either of them: By a deed to lead the uses of a recovery suffered in Hilary term, 13 G. 1, M. L. and E. L., son of E. L., conveyed the before mentioned *hereditaments* and premises to D. W., to make him tenant to the *præcipe*: The tithes had been enjoyed with the lands, since the time of James the First: The court refused to amend these recoveries by inserting the word tithes. *Phillips and Carey demandants.* *Avery and Phillips defendants.* 105

∴ No motion shall be made at the bar on the last day of any term touching the amendment of any fine or recovery, or any of the proceedings therein. *Regula generalis.* 122

FISHERY.
See Evidence, 19.

FRAUD.

See MONEY HAD AND RECEIVED.

FRAUDS (STATUTE OF.)
See Devise, 5.

FREEHOLD.

See LANDLORD AND TENANT, 1.

FREIGHT.
See INSURANCE, 2.

GAME.

An unqualified person, by the orders and in the presence of his master, a qualified person, set on his master's grounds a

trap for hares, &c., and afterwards, finding a hare therein, carried it, according to order, to his master, who was not present when the hare was found: *Held*, that the defendant was not liable to the penalties for using snares to destroy game, or for exposing game to sale. *Walker v. Mills.* 1

GAVELKIND.

See PLEADING, 11. *LANDLORD AND TENANT*, 5.

GRANT.

See EVIDENCE, 18, 19.

GUARANTEE.

A guarantee against contingent damages cannot form the subject of a mutual credit under the 5 G. 2, c. 30, s. 28. *Sampeson v. Burton.* 89

HIGHWAY RATES.

See BANKRUPTCY, 5.

HORSE.

A party who borrows a horse is bound to provide keep for it, unless an agreement is made to the contrary. *Handford v. Palmer.* 359

INCEPTION OF RISK.

See INSURANCE.

INSURANCE.

1. The East India Company, having hired A.'s ship to carry goods and 40 invalids, agreed, in concurrence with the government at Madras, to increase the number to 200, provided A. would make certain proposed alterations in his ship, and she should be found, on the usual military survey, capable of accommodating so many. A. agreed to the terms proposed, commenced the projected alterations, received the greater part of the goods on board, and had shipped water for 100 invalids, when, before the alterations were completed, the provisions shipped, or the invalids embarked, the vessel was so much disabled by a gale that she could not perform her homeward voyage: *Held*, in an action on a policy of insurance at and from Madras to the United Kingdom, on freight and passage-money, that there was a sufficient contract, and a sufficient inception of the risk, to render the insurers liable for the freight, and also for the passage-money of the 200 invalids. *Truscott v. Christie.* 320

2. Ship and freight were insured by separate sets of underwriters. The ship (a general seeking ship) was captured; an ship and freight were abandoned to the respective underwriters, who each pa-

a total loss. The ship being recaptured, performed her voyage and earned freight: *Held*, that the underwriter on ship was entitled to the freight.

Abandonment of ship to the underwriter on ship includes freight, and transfers freight earned subsequently to the abandonment to such underwriter, as incident to the ship. *Davidson v. Case.* 379

INTERLINEATION.

See Devises, 5.

LANDLORD AND TENANT.

And see Sheriff, 1.

Pleading, 1, 6, 11, 13, 14.

1. A conservatory erected by tenant for years (who had a remainder for life, after the death of his lessor) on a brick foundation, attached to a dwelling-house, and communicating with it by windows opening into the conservatory and a flue passing into the parlour chimney, becomes part of the freehold, and cannot be removed by the tenant or his assignees. *Buckland v. Batterfield.* 54

2. In 1814, a distress was made on a tenant for the whole of the rent due from him, and a deduction for land-tax was refused, the lease being silent as to the land-tax; the tenant having protested against his liability, paid, during five succeeding years, the land-tax, without renewing in any sort the objection of his non-liability to pay: *Held*, that in 1820 he could not recover, in an action for money paid to the defendant's (the lessor's) use, any of the sums so paid for land-tax. *Spragg v. Hammond.* 59

3. A stranger became possessed of a crop of growing corn, by purchase at a sale under a *feri facias*, upon which sale the landlord was paid a year's rent. The landlord, before the corn was ripe, distrained it for rent due subsequently to the sale: *Held*, that the distress was ill. *Peacock v. Purvis.* 362

4. Growing corn sold under a *feri facias* cannot be distrained for rent, unless the purchaser allow it to remain on the ground an unreasonable time after it is ripe. *Ibid.*

5. One of the several co-heirs in gavelkind may distrain for rent due to him and his companions without an actual authority from his companions. *Leigh v. Shepherd.* 465

6. A lessee took a farm under an agreement, which he never signed, and the terms of which his lessor, in a material point, failed to fulfil. In an action for the use and occupation of the farm: *Held*, that the jury might ascertain the value of the land, without regarding the

amount of rent reserved by the agreement. *Towninson v. Day.* 380

LAND-TAX.

See Landlord and Tenant, 2.

LEASE.

See Power. Renewal Fine.

LIBEL.

See Evidence, 3.

LIEN.

See Charter-Party.

LIMITATIONS, (STATUE OF.)

See Pleading, 3.

MARRIAGE SETTLEMENT

See Power. Replevin, 1.

MEMORIAL.

See Annuity, 1.

MILITARY INQUIRY.

See Evidence, 3.

MISNOMER.

See Practice, 1.

MONEY HAD AND RECEIVED.

And see Bankruptcy, 4. *Factor. Pleading*, 8.

The defendant having fraudulently induced the plaintiff to sell goods to A., who could not pay for them; and, on the nominal resale of these goods by A., in which the defendant was really concerned, having obtained himself the money paid on such resale: *Held*, that the plaintiff might, in an action for money had and received, recover of the defendant the value of the goods unpaid for by A. *Abbotts v. Barry.* 369

See Sheriff, 1. *Bankruptcy*, 8.

MUTUAL CREDIT

See Guarantee.

NOTICE.

See Sheriff, 1.

OATH.

See Evidence, 4.

OBLITERATION.

See Devises, 5.

OFFICE, ASSIGNMENT OF.

And see Clerk of the Peace.

An assignment of the profits of all the offices of trust, commissions, &c. which the defendant may acquire, is good, as to all offices which may be legally assigned, by way of indemnifying the plaintiff,

who has paid money for the defendant.
Harrington v. Kloprogge. 678

**ORDER FOR THE PAYMENT OF
MONEY.**
See STAMP.

PARTICULAR.
See EVIDENCE, 20.

PARTNERSHIP.
And see PLEADING, 2.

The plaintiff carried on dealings in one general and unbroken account, with A., one of the defendants, as his banker and army agent, from a period before 1807 up to 1819, when A. became bankrupt, and a balance was struck, none having been before struck since 1816. In 1807 defendant B. became a partner with A., and continued so till 1817; but the partnership was secret, and unknown to plaintiff till A.'s bankruptcy, defendant B. never interfering (to the knowledge of plaintiff) in the business carried on by A. At the expiration of the partnership in 1817, a balance was due from defendants to plaintiff: between the expiration of the partnership and A.'s bankruptcy. A. paid to plaintiff, and also received from plaintiff, several sums. In an action against the defendants for the balance due from them at the expiration of the partnership (A. having pleaded his bankruptcy and certificate,) *Held*, that B. might consider the sums paid by A. to plaintiff, after the expiration of the partnership, as paid in reduction of the balance due at the expiration of the partnership, and might take credit for them, without giving credit for any sums received after the expiration of the partnership by A. on account of plaintiff.
Brooke v. Enderby. 70

PERJURY.
See PRACTICE, 7.

PILOT ACT.
See PLEADING, 10.

PLEADING.

And see PRACTICE, 1. BILL OF EXCHANGE.

1. To an avowry by executors for rent due in the testator's life, it is no plea, "that the testator levied a sufficient distress for the same rent," unless it be also averred that the rent was thereby satisfied.
Lingham v. Warren. 36
2. A release was given by plaintiffs to A., one of two partners, with a provision that it should not prejudice any claims which plaintiffs might have against B., the other partner; and that, in order to enforce the claims against B., it should be lawful for plaintiffs to sue A., either jointly with B. or separately. In an ac-

tion by plaintiffs against A. and B., this release having been pleaded by A., and set out on oyer in the replication, with an averment that the action was prosecuted against A. jointly with B., for the purpose of enabling plaintiffs to recover payment of moneys due from B. and A. to plaintiffs, either out of the joint estate of B. and A., or from B. or his separate estate, the replication was demurred to, and the demurrer overruled. *Solly v. Forbes.* 38

3. Plaintiff employed defendant in 1808 to lay out money for him in the purchase of an annuity, and discovered in February, 1814, that the security provided by the defendant was void within the defendant's own knowledge, at the time of the purchase. In January, 1820, plaintiff sued defendant in *assumpsit*, for breach of an implied contract to provide good security: *Held*, that, the action proceeding on the contract and not on the fraud, the statute of limitations was a good bar.
Brown v. Howard. 73

4. Goods in the possession of a bankrupt, and, but for the bankruptcy, his property, being taken in execution after the act of bankruptcy, but two months before the issuing of a commission against the bankrupt, where (in *assumpsit* by the assignees of the bankrupt, on a guarantee given to the bankrupt,) described in the declaration as the goods of the bankrupt: *Held*, that such description was proper.
Sampson v. Burton. 89

5. Plaintiff, as administrator, declared in *assumpsit* that defendant, for certain fees to be paid him by intestate, undertook, as attorney, to investigate and see that a title about to be conveyed to intestate was a good one: breach, that he omitted to do so, and that intestate in consequence took an insufficient title, whereby his personal estate was injured. Defendant having demurred, the demurrer was overruled.
Knights v. Quarles. 102

6. A declaration on a replevin bond (conditioned for the plaintiff in replevin to appear at the county court and prosecute his suit with effect, and make a return of the cattle, goods, &c. distrained, if a return should be adjudged,) after alleging that the plaintiff was removed into the court above, that the defendant avowed, and that, plaintiff in replevin having omitted to plead to the avowry, a judgment for a return was awarded, averred, that the plaintiff in replevin did not prosecute his suit with effect. A plea, that, after the judgment for a return, a writ to inquire of the arrear of the rent and the value of the cattle, goods, &c. distrained, was prayed by the avowant, granted, and executed, and that thereupon avowant had judgment to recover the arrear of rent found, together with a sum for his costs

- and damages, was held ill on demurrer. *Turner v. Turner.* 107
7. The declaration stated, that in consideration plaintiff would, at the request of defendant, lend him a horse, defendant promised to take proper care of the horse, and return him to plaintiff in as good a condition as he was at the time of the promise, or pay fifteen guineas; the contract proved was, in addition to these terms, that the defendant should find the horse meat for his work: Held, that the contract was sufficiently stated in the declaration, and according to its legal effect. *Handford v. Palmer.* 359
8. Declaration, that defendant, on consideration, &c. promised to invest plaintiff's money on good security; breach, that he invested it on bad security; pleas, general issue and statute of limitations; replication, that defendant promised as above, within six years; proof, that within that time defendant acknowledged the security to be bad, and promised that plaintiff should be paid: Held, that plaintiff could not recover, the declaration stating no debt to which the subsequent promise could be applied. *Held,* also, that the defendant was not liable on a count upon an account stated; nor on a count for money had and received, as having received money for one purpose and applied it to another. *Whitehead v. Howard.* 372
9. If, in covenant for non-repairing, the covenant contains an exception of "casualties by fire," it is fatal, on *non est factum*, if the covenant be stated in the declaration without such exception; and the court will refuse to permit the plaintiff to amend on paying the costs of the trial. *Browne v. Knill.* 395
10. In an action against the master of a ship for penalties under the 34th section of the pilot act, the declaration must allege that the unlicensed pilot offered to the master to take charge of the ship; or, that such pilot offered to take such charge in the presence of the master; and it is not sufficient merely to follow the words of the section. *Peake v. Carrington.* 399
11. An avowry by one of several co-heirs in gavelkind in his own right, with a cognisance as bailiff of the other co-heirs, is sufficient, without averring an authority to distrain from the other co-heirs. *Leigh v. Shepherd.* 465
12. In a declaration in debt in C. B. a reference to the *clausum fregit* of the writ is not necessary; and an averment, under a *videlicet*, that the court was sitting on a day in vacation, may be regarded as surplusage. *Luckett v. Plummer.* 659
13. Tenants in common may sue in covenant, for neglect of repairs, the lessee of a house, who, subsequently to the demise, but before the breach alleged, becomes a co-tenant of the plaintiffs in the same house. *Yates v. Cole.* 660
14. In replevin, plea of a former distress for the same rent, without adding that the rent was satisfied, is bad. *Hudd v. Ravenor.* 662

POWER.

Devisee for life, with a power enabling her, in consideration of marriage, to revoke the uses limited to her, and to appoint to such uses, and with such powers and provisoies, and in such manner as was by her afterwards done, by a deed of settlement, in consideration of marriage, revoked the uses, and appointed the lands, to hold to the use, after the marriage, of her husband for life, *sans* waste; and after his decease, to the use of herself for life, *sans* waste; with remainder to divers other uses, for the benefit of the issue of that marriage, and also of the issue of the appointor; remainder as she should by will appoint, with remainder to the use of herself in fee. The settlement contained a power for the husband and wife, from time to time, when in possession of the premises so limited to them for their lives, by indenture to demise such premises as then were leased for lives, or for years determinable on lives, to any persons, in possession or reversion, for one, two, or three lives, so as there were not thereon any greater estate or interest subsisting at any one time, than what would be determinable on the dropping of three lives; and so as there were reserved the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial rents, duties, and services, or more, or a just proportion of such ancient or the then reserved rents, &c. (except heriots, which might be varied at will;) and so as there were contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved: and also, by indenture to demise any of the premises for any term absolute, not exceeding 31 years, in possession, and not in reversion; so as there were reserved so much, or as great and beneficial yearly and other rent and rents, and other services proportionably, as then were therefore paid and yielded, or the best and most improved yearly rent and rents that could be reasonably had or obtained for the same, without taking any fine; and so as in every such lease there were contained a clause of re-entry, in case the rents reserved were unpaid by the space of 28 days: and also, by indenture to demise any of the premises wherein or whereupon any mine or mines should be open, or any person should be willing to open any mine, for any term not exceeding 31 years in possession, so as upon every such lease there were re-

served such share of the produce, or such yearly rent, as could reasonably be obtained without taking any fine; and so as the lessees were not by any express clause freed from impeachment of waste, other than in the necessary and reasonable working thereof; and so as there were inserted such proper and usual covenants for the effectually winning and working the mines, and smelting the ore, and doing other acts, as were usually inserted in leases of the like nature. The lands in the declaration mentioned had been and were leased, and were under and subject to a lease, for a term of years determinable on lives. The husband, after the marriage, by indenture, in consideration of the former lease and of 105*l.* and of the yearly rents, duties, payments, services, articles, covenants, provisoies, and agreements thereafter specified and reserved on the part of the lessees, demised the lands in question for 99 years, if three or either of them should so long live, paying the yearly rent of 2*l.* by equal portions, at Michaelmas and Lady-day, with a couple of fat capons, or 1*l.* 6*d.* in lieu thereof, at the election of the lessor; and also a heriot of the best beast, or 40*s.* in lieu thereof, upon the death of every tenant dying in possession; and the like upon every assignment, sale, forfeiture, or alienation; and also the lessees yielding and doing constant suit of mill, paying such toll and mulfure as others grinding their corn there should pay. The lease contained a covenant by the lessees to pay the yearly rent of 2*l.*, and the duties, heriots, suits, services, and other reservations, at the time and in the manner limited and appointed for payment and performance of the same, or else the several sums reserved in lieu thereof; with a proviso, that *if at any time the rent of 2l., and every or any of the duties, services, reservations, and payments thereby reserved, or any part, should be unpaid or undone by 15 days next over or after any of the times whereat or whereupon the same ought to be paid, done, or performed, and no sufficient distress or distresses could or might be taken upon the premises;* or, if the lessees should leave the premises in decay six months after view had and notice given or should commit any wilful waste, or grind their corn at any other mill (the lessor's mill being in repair;) or if the lessees should assign without license, or if any default should be by the lessees made in the payment or performance of all or any of the reservations, covenants, and agreements thereinbefore on their parts contained, *then the lessor, and the person to whom the freehold of the premises should belong, might re-enter.* Upon the trial of an ejectment, evidence was received that

the usual and accustomed form of leases of the estate contained in the marriage-settlement, for lives or years determinable on lives, as well prior as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in this indenture.

Held, that the lease was a good execution of the leasing power.

And, that the evidence of the former leases was well received. *Smith v. Doe dem. Jersey.* 473

PRACTICE.

1. A misnomer of the plaintiff can only be taken advantage of by plea in abatement, and affords no ground for setting aside proceedings on motion. *Morley v. Law.* 34
2. Where a prisoner who had been charged with a declaration as of Trinity term, 1819, absconded during the long vacation, and did not return to custody till Hilary term, 1820, the court would not discharge him though the plaintiff had not signed judgment by the end of Hilary term, 1820. *Grimes v. Joseph.* 35
3. The court refused to set aside as irregular a bill filed against the warden of the Fleet, on the day after the essoin day of Easter term, entitled as of Easter term, and accompanied with a notice to plead in four days, the plaintiff not having signed judgment within eleven days after the filing of the bill. *Bolton v. Eyles.* 51
4. Affidavit to hold to bail, stating that R. M. was justly and truly indebted unto the said J. W. in the sum of, &c. and upwards: "as the acceptor of a certain bill of exchange, bearing date, &c., drawn by the said J. W. for a valuable consideration on, and accepted by the said R. M., payable two months after the date thereof, and due at a day now past." *Held,* to contain a sufficient description of the debt. *Warmsley v. Macey.* 338
5. Affidavits to hold to bail: one by A. B., stating C. D. to be "justly and truly indebted to this deponent" in a certain sum, "as endorsee" of bills of exchange "drawn by E. F. upon, and accepted by, C. D., payable to the order of the said E. F., at a certain day now past, and endorsed to this deponent." The other, by A. B., stating G. H. to be "justly and truly indebted to this deponent" in a certain sum, "as endorsee of a certain bill of exchange drawn by E. F. upon, and accepted by, the said G. H., payable to the order of the said E. F. at a certain day now past." *Held,* to contain a sufficiently certain description of the respective debts of C. D. and G. H. *Lamb v. Newcomb, Same v. Edwards.* 343
6. A turnkey cannot be bail. *Daly v. Brooshoft.* 359
7. The court will not set aside the justifica-

tion of bail on account or perjury subsequently discovered, but will leave the party to his indictment for perjury. *Shee v. Abbot.* 619

PRINCIPAL AND AGENT.

See Factor.

PRISONER.

See Practice, 1.

PRIVILEGE.

See Attorney, 2.

PROMISSORY NOTE.

A promissory note, by which the makers, as executors, *jointly and severally*, promise to pay on demand, with interest, renders them personally liable. *Childs v. Monnins.* 460

PROMOTIONS, 1.

RECOVERY.

See Fines and Recoveries, Practice of Passing.

A. was seized of an estate for life; remainder to his sons, B., C., D., and E., in tail, in such shares and proportions as A. should appoint by will. In 1807, A., B., C., and D. conveyed the entirety of the premises to make a tenant to the *præcipe*, so that one or more recoveries should be suffered, in which A., B., C., D., and E. should be vouchees for the purpose of barring all estates tail: a recovery was then suffered, in which B. and C. were vouched. In 1809, A., B., C., D., and E. conveyed all the premises to make a tenant to the *præcipe*, in a recovery which was suffered in 1810, in which E. was vouched; and, in 1811, a recovery was suffered, in which D. was vouched.

Held, that by these conveyances and recoveries, the estates tail in B., C., D., and E. were well barred. *Collyer v. Mason.* 685

RE-ENTRY.

See Power.

REFEREE.

See Trover.

REGULÆ GENERALIS.

See Fines and Recoveries, 5. EJECTMENT.

RENEWAL FINE.

A. being possessed of certain premises held under an archbishop by lease, renewable from time to time on payment of certain fines and fees, demises the premises for a term to B., who covenants "that he will, from time to time, and at every time during the said term, pay to A. or the archbishop, such part of the fine and fees which, upon every renewal by A. of the

lease by which he holds the premises demised, shall be paid, or payable, by A. in respect of the premises demised to B." A. afterwards renews his lease under the archbishop for a period exceeding, by five years, the term demised to B.: *Held*, that B. was not liable, upon this covenant, to pay the whole of the fine and fees incurred by A. upon the renewal of his lease to the extent above mentioned, but only a part of such fine and fees, commensurate with the interest which B. had acquired in the premises. *Charlton v. Driver.* 345

RENT ARREAR.

See Landlord and Tenant, 3, 4, 5.

POWER.

REPLEVIN.

*And see Attorney, 1. Pleading, 6, 14.
Replevin Bond.*

1. By a settlement made on the marriage of Sir H. J. P., the estate T. was settled to the use of Sir H. J. P. for life, remainder to his first and other sons in tail male, reversion to Sir H. J. P. the settlor, in fee. There was issue of the marriage a son, J. P. who attained the age of twenty-one, but died in 1767 without issue, leaving Sir H. J. P., his father, him surviving. J. P. took upon himself, among other things, to devise the estate T. to his father for life, with remainder to his sisters of the half-blood, M. and A. in fee. Sir H. J. P. accepted certain benefits under this will; and in 1769, devised the estate T. (after the deaths of his daughters M. and A. without issue male) to H. P. for life, with several remainders over. In an action of replevin, by a person claiming under the will of Sir H. J. P., the avowant, who claimed as heir of A., read in evidence the answer of the real plaintiff to a bill filed against him by the avowant, in which answer the real plaintiff admitted, that he believed that certain articles of agreement between Sir H. J. P. and his son J. P., were made in the year 1766, whereby J. P. agreed to pay 700*l.*, and an annuity of 200*l. per annum* to his father, who, in consideration thereof, agreed to convey estate T. immediately to his son, subject to a proviso, that if the son should die in the lifetime of the father, the conveyance was to be wholly void. *Held*, that Sir H. J. P. was not, by accepting benefits under the will of J. P., divested of the reversion in estate T.; that M. and A. took nothing in the estate under the will of J. P.; and that, on the trial it was not necessary for the judge to direct the jury to presume, that some conveyance of the reversion in fee had been made by Sir H. J. P. to his son J. P.
2. The letters of a party, under whom the plaintiff did not claim, were held inad-

missible as evidence to affect the plaintiff's title. *Halford v. Dillon.* 12

REPLEVIN CLERK.
See ATTORNEY, 1.

REPLEVIN BOND.

Sureties in a replevin bond are not discharged by the execution of a writ of inquiry, under 17 Car. 2, c. 19, s. 23, and a judgment thereon for avowant to recover the arrear of rent found, together with a sum for his costs and damages. *Turnor v. Turner.* 107

REQUESTS, COURT OF.

See ATTORNEY, 2.

REVOCATION.

See DEVISE, 5.

SEWERS.

The decree of the commissioners of sewers is not conclusive against a party residing within the district over which they preside; but such party may prove, in an action brought against a defendant for taking goods to satisfy the rate, that he derives no benefit from the sewer on account of which he is rated. *Stafford v. Hamston.* 691

SHERIFF.

1. The trustees of an outstanding satisfied term, assigned in trust to attend the inheritance, may sue the sheriff for not retaining, after notice to do so, in an execution against the tenant, a year's rent due to the landlord.

2. A notice to the sheriff in such case, stating that the rent was due to J. W. and the mortgagees of his estate, and signed by a person who was not the receiver appointed by the mortgage deed, was held sufficient.

3. The sheriff is liable, in such case, if he remove any of the tenant's goods without retaining the year's rent. *Colyer v. Speers.* 67

2. Where a sheriff by mistake returned to a *fieri facias* that he had a sum in his hands to be paid to the plaintiff's, when in truth he had not, the sum in question having been paid (through want of caution in the sheriff's officer) to the solicitor of a commission of bankrupt issued against the defendant, under which commission one of the plaintiffs was an assignee: *Held*, that this plaintiff knowing of such payment and having omitted to make an early objection to it, the sheriff was absolved from paying to the plaintiff the sum mentioned in his return. *Tomlinson v. Shynn.* 77

SHIP.

See BANKRUPTCY, 3. *INSURANCE. CHARTER-PARTY.*

STAMP.

The following letter from F. and Co. to their correspondents S. and Co., "Gentlemen, we request you will pay to Messrs. H. C. and son, or their order, out of the first proceeds that become due of our stock of gunpowder now in your hands, 600L, and charge the same to our account," was held an order for the payment of money, under 55 Geo. 3, c. 184, and liable to be stamped as such, and not with an agreement stamp, although the letter formed part of a correspondence between the three houses, being followed by a letter to H. C. and son from S. and Co., promising to pay as directed, *provided they should be in funds for the purpose*, and by other letters between the houses of F. and Co. and S. & Co. relating to, and confirmatory of, the same order. *Butts v. Swann.* 78

SURETIES.

See REPLEVIN BOND.

TENANTS IN COMMON.

See PLEADING, 13.

TITHES.

See FINES AND RECOVERIES, PRACTICE OF PASSING, 4.

TOLL.

By the 3 G. 3, c. 67, (local act,) under which a turnpike gate was erected at L., the toll, when carriages passed, was imposed on the carriages, not on the horses drawing them, and persons having paid on passing, were, on their return the same day, exempt from toll. By the 49 G. 3, c. 28, (local act,) applying to the same turnpike, and reciting the former act, the old tolls were repealed, and the new toll, when carriages passed, was imposed, not on the carriages, but on the horses drawing them: in the latter act, all the provisions, regulations, and clauses of the former were continued as fully as if they had been re-enacted: *Held*, that where the toll imposed by the latter act, had been paid for horses passing with a carriage, those horses were exempted from toll on returning the same day, though with a different carriage. *Gray v. Shilling.* 30

TRESPASS.

See CONSTABLES. EVIDENCE, 18. *TROVER.*

TROVER.

A. sued B., in trespass for taking a filly; B. justified that the filly belonged to C., and was taken by C.'s command. Verdict for A., with damages, subject to an award by D., to whom the filly was delivered with the consent of A. and C., in order that D. might determine, in a given time, whether the filly was marked with

a certain scar; in case the scar should appear, the verdict for A. to stand. D., by his award in due time, stated that the scar had appeared, and ordered the verdict to stand. Ten days after, C. demanded the filly of A., who refused to deliver it; a month afterwards C. sued D. in trover for the filly: *Held*, that this detention of the filly by D. did not amount to a conversion. *Ginston v. Nurse*. 447

TRUSTEE.*See Sheriff*, 1.**TURNPIKE.***See Toll.***VARIANCE.***See PLEADING*, 9.

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USAGE.*See EVIDENCE*, 18.**USE AND OCCUPATION.***See LANDLORD AND TENANT*, 6.**UNDERWRITERS.***See INSURANCE.***WARDEN OF THE FLEET.***See PRACTICE*, 3.**WARRANT OF ATTORNEY.**

If the defeasance on a warrant of attorney state that it is given to secure the payment of a sum on *demand*, and, in case default shall be made, then judgment to be entered up and execution issue, an actual demand must be made; and a proposal to settle amicably does not amount to such a demand. *Nicholl v. Bromley*.

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WITNESS.*See EVIDENCE*, 4 to 17.**WRIT OF INQUIRY.***See REPLEVIN BOND.*

END OF THE SECOND VOLUME.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY

RICHARD VAUGHAN BARNEWALL,
OF LINCOLN'S INN,

AND

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OF THE INNER TEMPLE, ESQRS., BARRISTERS AT LAW.

VOL. IV.

CONTAINING THE CASES OF MICHAELMAS, HILARY, EASTER, AND
TRINITY TERMS, IN THE 1st AND 2d OF GEO. IV., 1820, 1821.

PHILADELPHIA:

T. & J. W. JOHNSON, LAW BOOKSELLERS.

1852.

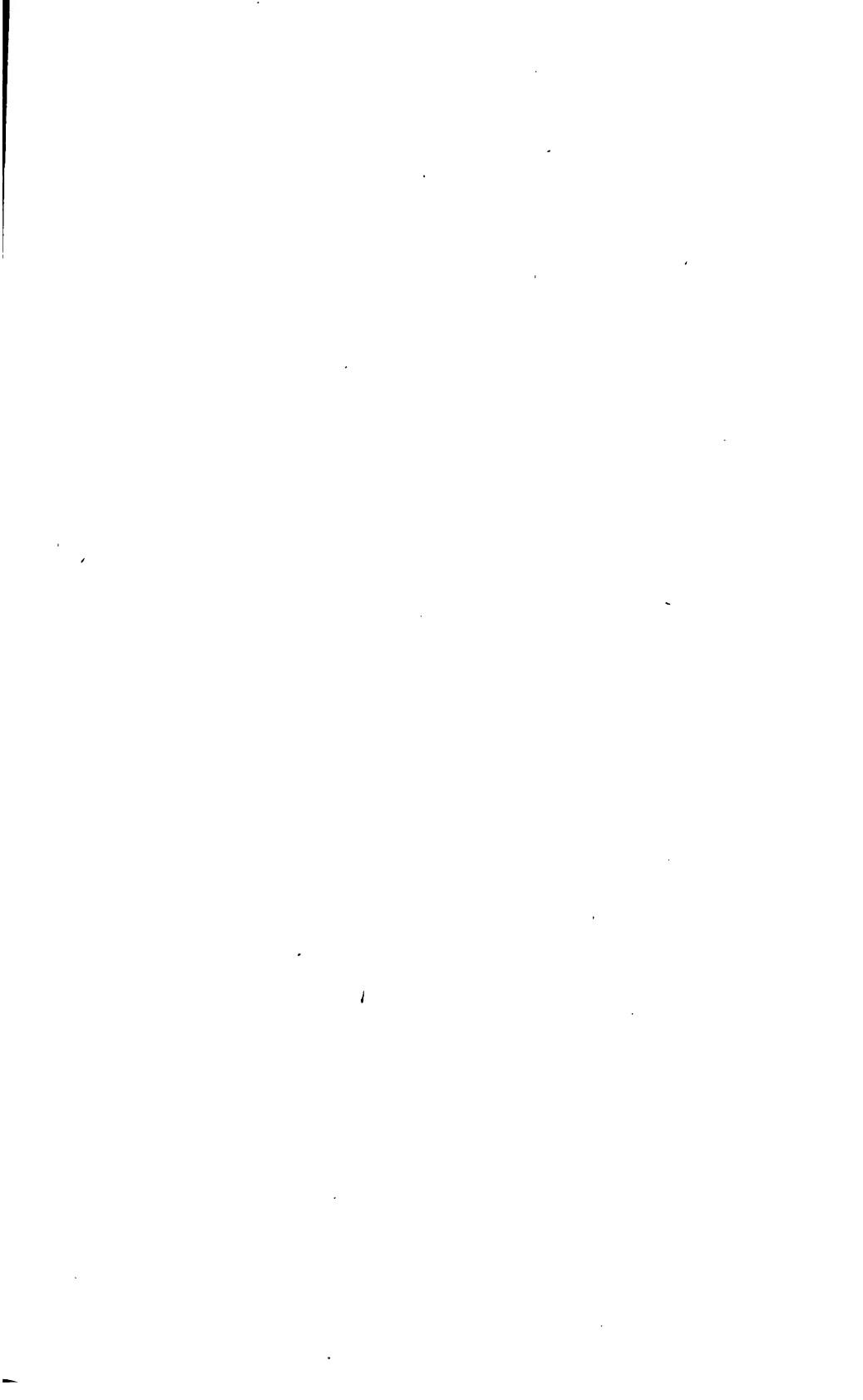


JUDGES
OF
THE COURT OF KING'S BENCH,
DURING THE PERIOD OF THESE REPORTS

Sir CHARLES ABBOTT, Knt., C. J.
Sir JOHN BAYLEY, Knt.
Sir GEORGE SOWLEY HOLROYD, Knt.
Sir WILLIAM DRAPER BEST, Knt.

ATTORNEY-GENERAL.
Sir ROBERT GIFFORD.

SOLICITOR-GENERAL.
Sir JOHN SINGLETON COPLEY.



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C A S E S
A R G U E D A N D D E T E R M I N E D
I N T H E
C O U R T O F K I N G ' S B E N C H .

I N

Michaelmas Term,

I N T H E F I R S T Y E A R O F T H E R E I G N O F G E O R G E I V .

WOOKEY v. POLE, Bart. and Others.

An exchequer bill, the blank in which was not filled up, having been placed for sale in the hands of A., he, instead of selling it, deposited it at his banker's, who made him advances to the amount of its value. A. afterwards becoming bankrupt, it was held by three justices, Bayley, J., dissentiente, that the owner of the exchequer bill could not maintain trover against the bankers, the property in such an exchequer bill, like bank notes and bills of exchange endorsed in blank, passing by delivery.

THIS was an action of trover for an exchequer bill, for the payment of 1000*l.* and interest. The defendants pleaded the general issue; and the cause coming on to be tried at the sittings in London, after Michaelmas term, 1818, before the lord chief justice, a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:

The plaintiff was, on the 1st of November, 1817, proprietor and possessor ^{*2]} of a legal and valid exchequer bill, *worded and signed as follows, "No. 8333, 12 May, 1817. By virtue of an act of parliament quinquagesimo Septimo Geo. 3, Regis, for raising the sum of 24,000,000*l.* by exchequer bills, for the service of the year 1817, this bill entitles or order, to one thousand pounds, with interest after the rate of 2*½d.* per centum per diem, payable out of the first aids or supplies to be granted the next session of parliament, and this bill is to be current and pass in any of the public revenues, aids, taxes, or supplies, or at the receipt of exchequer at Westminster after the 5th day of April. Dated at the Exchequer the 12th day of May, 1817. If the blank is not filled up, the bill will be paid to bearer.

"GRENVILLE.

"N. B. The checks must not be cut off."

Early in the month of November the plaintiff sent such exchequer bill by his wife to Messrs. Pawsey and Eaton, who were then stockbrokers, carrying on business in copartnership, for the purpose of being sold, and the wife delivered it to them, with orders to sell it for the plaintiff, and to invest the proceeds of such sale in 5 per cent. stock in the plaintiff's name. They, however, did not sell the exchequer bill as they were directed, nor did they buy any stock for the plaintiff, but took the bill so delivered to them to the defendants, (who carry on business in partnership as bankers, and with whom Pawsey and

Eaton had a banking account,) deposited it with them, the same still continuing in blank as to the name of any payee, and in consequence of such deposit, got them to place to the credit of their banking account a sum of 800*l.* on the 7th November afterwards, and another sum of 200*l.* on the 8th of the same month, before the defendants had any knowledge *of the circumstances or terms [*3 upon which Pawsey and Eaton held the same bill; but the defendants did not place the exchequer bill to the credit of Pawsey and Eaton. The latter afterwards, at various times, paid in to the credit of their banking account with the defendants, moneys amounting to 300*l.* and upwards, and also drew moneys out at various times; and on the 27th January, 1818, they had drawn out of defendants' hands all the funds to their credit within 4*l.* 10*s.*, and the balance still remains unsettled. The plaintiff, as soon as he was informed of this misconduct of Pawsey and Eaton, being the 14th January, 1818, applied to the defendants, explained the facts, and required to have the exchequer bill in question delivered up to him; but the defendants refused to deliver it up to the plaintiff, saying they had advanced money to Pawsey and Eaton on its security. The defendants afterwards, on the 27th January aforesaid, sold the said bill on their own account, and received the proceeds.

The case was argued in last Easter term by

Sir *W. Owen*, for the plaintiff. The question in this case is, whether an exchequer bill is to be considered as money or goods. If it be of the latter description, it may be followed into the hands of a third person, unless it be transferred by the owner or under his authority, or by sale in market overt. In the case, indeed, of money, bank notes, or bills of exchange endorsed in blank, it has been held that trover will not lie against a third person, coming bona fide into possession and giving value; and the reason assigned for this is, because they are the circulation of the country, which would be impeded if pursued. They have a fixed value; money by royal proclamation, and notes and bills as the representatives *of money; but exchequer bills constitute [*4 no part of the currency of the country, nor are they negotiable instruments. The exchequer bills are made for large sums, none under 100*l.*, and so not adapted for the purposes of currency. They are issued under acts of parliament, passed since the Revolution, and called in at certain times, and paid off. All exchequer bills of late years have been issued under various regulations, made by the 48 G. 3, c. 1, which have been recognised by the subsequent acts, and, among others, by the 57 G. 3, c. 2, under which this bill issued. Exchequer bills are sold in market overt as stock, varying in its value, being sometimes at a premium and at others at a discount. In *Nightingale, Assignees, v. Devisme*, 5 Burr. 2589, it was decided that stock could not be considered as money, and in *Ford v. Hopkins*, 1 Salk. 283, which was an action for lottery tickets, HOLT, C. J., said, "that if bank notes, exchequer notes, or million tickets are stolen or lost, the owner has such an interest or property in them, as to bring an action into whatsoever hands they are come." Lord *MANSFIELD*, indeed, in *Miller v. Race*, 1 Burr. 452, considers the report in *Ford v. Hopkins* as incorrect in making Lord *HOLT* speak of bank notes, exchequer notes, and lottery tickets, as like to each other; but what Lord *MANSFIELD* says as to lottery tickets is applicable to exchequer bills; he says, "No two things can be more unlike than a lottery ticket and a bank note: lottery tickets are identical and specific. Specific actions lie for them. They may prove extremely unequal in value; one may be a prize, another a blank. Land is not more specific than lottery tickets are. A bank note is constantly and universally, both at home and abroad, treated as *money*, *as *cash*; and paid and received [*5 as *cash*; and it is necessary for the purposes of commerce, that their *currency* should be *established* and *secured*." None of these observations apply to exchequer bills, which, like stock, rise and fall in value. In *MacLish v. Ekins*, Say. 73, it was expressly decided that the property in a navy bill, which

was payable to plaintiff and his assigns, would not pass without assignment. The period of the transaction in this case is material; for it takes place between November, 1817, and January, 1818, and this bill was not to be taken in payment for taxes till the 5th April, 1818. Till that time, therefore, it could not be considered as cash. Secondly, If an exchequer bill is to be considered in the nature of goods, then the stockbroker was an agent for selling the exchequer bill and investing the amount in 5 per cent. stock, and an agent employed in a specific act cannot bind his employer, unless his authority be strictly pursued. *Fenn v. Harrison*, 3 T. R. 757; *Patterson v. Tash*, 2 Strang. 1178; *Newsom v. Thornton*, 6 East, 17; *Daubeny v. Duval*, 5 T. R. 604; *De Bouchot v. Goldsmid*, 5 Ves. 211. This is a case of pawning by the broker; but if it had been a sale by him it would have made no difference, *Wilkinson v. King*, 2 Campb. 335.

Chitty, contrà. This is a negotiable instrument, like a bill of exchange; it is transferable before it is due, and it is expressly stated, that if the blank be not filled up it will be paid to the bearer. Such an instrument must, therefore, in its very nature, be transferable by delivery; and in *Goldsmid v. Gaden*, cited in *Collins v. Martin*, 1 Bos. & Pull. 649, it appears that the lord chancellor was of [6] opinion that navy bills, endorsed in blank, passed by delivery; "and in *Collins v. Martin* it was held, that the property in bills of exchange endorsed in blank, deposited with a banker, to be by him received when due, who raised money upon them by pledging them to another, passed to the pledgee, and that the banker having afterwards become bankrupt, the real owner could not recover the value. These authorities are expressly in point; for it is impossible to distinguish an exchequer bill, in which the blank is not filled up, from a bill of exchange or a navy bill endorsed in blank.

Cur. ad. vult.

The case stood over until this term, when there being a difference of opinion on the bench, the judges delivered their opinions seriatim.

Best, J. The question which the court is called on to decide is, whether exchequer bills are to be considered as goods, or as the representatives of money; and as such, subject to the same rules as to the transfer of the property in them as are applicable to money. The delivery of goods by a person who is not the owner (except in a manner authorized by the owner) does not transfer the right to such goods; but it has been long settled, that the right to money is inseparable from the possession of it. I conceive that the representative of money, which is made transferable by delivery only, must be subject to the same rules as the money which it represents. It was said by the court, in [7] *Higgs v. Holiday*, Cro. Eliz. 746, "that where the owner of *money had lost the possession of it, he had lost the property in it, because it cannot be known;" and Lord HOLT, recognising this doctrine in the case of *Ford v. Hopkins*, Salk. 283, adds, "but if bank notes, exchequer notes, million tickets, or the like, are stolen or lost, the owner has such an interest in them as to bring an action into whatsoever hands they are come." It is not because the loser cannot know his money again that he cannot recover it from a person who has fairly obtained the possession of it; for if his guineas or shillings had some private marks on them by which he could prove they had been his, he could not get them back from a bona fide holder. The true reason of this rule is, that by the use of money the interchange of all other property is most readily accomplished. To fit it for its purpose the stamp denotes its value, and possession alone must decide to whom it belongs. If this be correct as to money, it must be so as to what is made to represent money, and Lord HOLT has himself so decided. In an anonymous case, Salk. 126, he held that trover could not lie by one who had lost a bill of exchange against one who had given for it a valuable consideration. The same judgment was given in the case of a lost bank note in *Miller v. Race*, 1 Burr. 452. It cannot be disputed but that this

exchequer bill was made to represent money, as much as a bank note or bill of exchange. It was given for a debt due from government; it is payable (the blank not being filled up) to bearer, and transferable by delivery; and is on its face made *current, and to pass in any of the public revenues, or at the receipt of the exchequer.* But it has been said, these bills are not used as negotiable instruments, as bank bills and bills of exchange are; but are the objects * of sale. I do not see why they should not be used as negotiable instruments; they are transferred with the same facility as other bills; and I know from the legislature that they may be used in payments, for the statutes direct that they should be received for taxes. We also know that bills of exchange are as frequently sold as they are delivered in payment. It is the business of bill brokers to negotiate these sales. But the great point is, that they are not like goods taken on the credit of the person from whom you receive them, but on that of government. The receiver never inquires from whom they come, further than to satisfy himself that they are genuine bills. Indeed, when they are in blank, he has no means of ascertaining from whom they come. How could the defendants, in this case, find out that this bill had ever belonged to the plaintiff? It is the plaintiff's own negligence in not filling up the blank, that has rendered it impossible for the defendants to ascertain that he had any right to it; and it would, therefore, be inconsistent with law and justice that under such circumstances, he should be allowed to call on them to make good the loss that has arisen from the fraud of his agent. It seems to be the opinion of Lord Chief Justice LEE, who pronounced the judgment of the Court K. B., in *Hartop v. Hoare*, 3 Atkins, 50, that there is no difference between *money, bank notes, and exchequer bills.* His lordship observes, that Lord HOLT had decided in *Ford v. Hopkins*, "that if money is stolen and paid to another, the owner can have no remedy against him that received it; but if bank notes, exchequer bills, or million tickets, or the like, are stolen or lost, the owner has such an interest or property in them as to bring an action into whatever hands they "come." Lord Chief Justice LEE says, "This must mean that the owner can bring an action into whatever hands they come, without a valuable consideration paid for them; for if it be not thus understood, what Lord HOLT says here will not agree with his former opinion." This also gives me the authority of Lord HOLT for saying that there is no difference between *bank notes and exchequer notes;* and the same learned judge has decided that bills of exchange pass as money. Should the deposit of this bill with the defendants, under the circumstances in which it was deposited, be considered as pledging the bill, that circumstance will make no difference, if the property in the bill passes by delivery. In *Collins and Martin*, 1 Bos. & Pull. 648, a banker pledged bills, endorsed in blank, that had been deposited with him by a customer. The banker had no authority from the owner to part with these bills; but the court held, that with respect to bills of exchange endorsed in blank *property and possession are inseparable.* The pawnee had a right to detain the bills until the sum raised on them by the bankers was paid. On these grounds, I think that a nonsuit should be entered in this case.

HOLROYD, J. It has been long and fully settled, that bank notes or bills, drafts on banker's bills of exchange, or promissory notes, either payable to order and endorsed in blank, or payable to bearer, when taken bona fide, and for a valuable consideration, pass by delivery, and vest a right thereto in the transferee, without regard to the title or want of title in the person transferring them. This was decided, as to a bank note, in the case of *Miller v. Race*, 1 Burr. 452, as to a draft on a banker in *Grant v. Vaughan*, 3 Burr. 1516, and as to a bill of exchange endorsed in blank, in *Peacock v. Rhodes*, Doug. 636. Those cases have proceeded on the nature and effect of the instruments, which have been considered as dis-

tinguishable from goods. In the case of goods, the property, except in market overt, can only be transferred by the owner, or some person having either an express or implied authority from him ; and no one can, by his contract or delivery, transfer more than his own right, or the right of him under whose authority he acts. But the courts have considered these instruments, either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to money, and following the nature of their principal. In the one case they are payable to the person, whoever he may be, who is the bearer or holder of the instrument ; and so also in the other case, unless the payment is restrained by a special endorsement. In *Peacock v. Rhodes*, Douglas, 636, Lord MANSFIELD says, "The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes, it would stop their currency." Again, he says, "I see no difference between a note endorsed in blank, and one payable to bearer." And in *Miller v. Race*, speaking of bank notes, he says, "They are not goods, nor securities, nor documents for debts, nor are so esteemed, but are treated as *money*, as *cash* in the ordinary course and transaction of business, by the general consent of mankind, *which gives them the credit and currency of

*11] money, to all intents and purposes : they are as much money as guineas themselves are, or any other current coin that is used in common payments, as money or cash." These authorities show, that not only money itself may pass, and the right to it may arise by currency alone, but further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in the like manner, by currency or delivery. These decisions proceed upon the nature of the property (viz. money) to which such instruments give the right, and which is itself current ; and the effect of the instruments, which either give to their holders, merely as such, the right to receive the money, or specify them as the persons entitled to receive it. The question, then, is, whether these principles apply to the present case, or whether this exchequer bill and the right thereto, follow the nature of goods, which, except in market overt, can only be transferred by the owner, or under his authority ? In order to ascertain that, we must consider the nature and effect of the instrument, both as to the property which it concerns, and as to its negotiability or currency by law. In its original state, it purports to entitle the holder to the sum of 1000*l.* and interest ; and the original holder may, if he pleases, secure it to himself ; but it is payable to the bearer, until some name is inserted, and when that is done, it becomes payable to such nominee, or his order. But if the original holder parts with it or keeps it in blank, he by that very act, or by his negligence if he loses it, authorises the bearer whoever he may be, to receive the money ; and so, if he were to insert his own name, but endorse it in blank, instead of restraining its negotiability, either by not endorsing it at all, or by *making a special endorsement, he thereby authorises

*12] and empowers any person, who may be the holder *bona fide* and for value to receive it ; and he cannot revoke that authority, when it has become coupled with an interest. The instrument is created by the stat. 48 G. 3, c. 1, and is thereby made negotiable and current. By section 2, the commissioners of the treasury are to make out exchequer bills, in such manner and form as they shall direct ; and after certain things are done, to put them into circulation. By section 5, they may be paid in to the receivers of taxes ; and in section 13 are these words : "And for the better supporting the currency of the said exchequer bills, and to the end a sufficient provision may be made for circulating and exchanging the same for ready money, during such time as they or any of them are to be current, the commissioners of the treasury are empowered to contract with persons who will undertake to circulate and exchange them for

ready money ;" and by section 18, "on proof as therein specified, if any exchequer bill is lost, burnt, or destroyed, and on a certificate obtained, as therein mentioned, the commissioners of the treasury are authorized to pay the money, as if the bill had been brought in to be paid off, provided the payee gives security to pay into the exchequer, for the use of the public, so much as shall be paid him, if the exchequer bill shall be afterwards produced." An exchequer bill is, therefore, an instrument for the repayment of money originally advanced to the public, purporting thereby to entitle the bearer to receive the money, put into circulation, and made current by law. It is not, therefore, like goods saleable only in market overt, and not otherwise transferable, except by the owner, or under his authority, but is, in all those several respects, similar to bills of exchange and promissory *notes, and transferable in the same manner as [*_13 they are. The case, therefore, stands thus : this exchequer bill was a current and negotiable instrument for the payment of money. Now money passes from one person to another, by reason of its currency ; and for that reason only, and not because it has no ear-mark, it cannot be recovered from the person to whom it has been passed. The exchequer bill, therefore, seems to me, upon the same principle, to follow the nature of the money for which it is a security. The case of *Maclish v. Ekins*, Sayer, 73, has been cited, to which this is said to bear a resemblance. That case is very distinguishable from the present. It was the case of a navy bill, payable to the plaintiff, or his assigns, and not to bearer. By the very terms, therefore, of that instrument, the holder was not entitled to receive the money ; and the question in that case went upon the ground of the want of an assignment ; and there, too, the defendant received the navy bill under circumstances which showed that he doubted the broker's authority to dispose of it. Here the brokers had a distinct authority to sell, and they might have sold the exchequer bill to the defendants as their own ; and this is like the case of a bill endorsed in blank, payable to bearer, where the right arises from the instrument itself, and it is not necessary to deduce the title through the intermediate holders ; and in that case, *Collins v. Martin*, 1 Bos. & Pull. 648, is a distinct authority to show, that if the party with whom such bills are deposited, raise money upon them by pledging them with A., the owner cannot afterwards maintain trover for them ; and the authority of that decision was confirmed in *Truellett v. Barandon*, 1 B. Moore, 543. *Now [*_14 if it be clear, that this exchequer bill follows the nature of bills of exchange payable to bearer, these authorities are expressly in point to show, that the brokers might pledge this exchequer bill, and by the delivery of it transfer the property in it to the defendants. Upon these grounds, it seems to me that there ought to be judgment of nonsuit.

BAYLEY, J. This was an action of trover for an exchequer bill. The bill was dated the 12th May, 1817, and purported to be payable out of the first aids to be granted the then next session of parliament, and to be current in any of the public revenues and taxes after the 5th April. The form of the bill was, "This bill entitles or order to 1000*l.*, with interest at 2*d.* per day," and it had a memorandum at the foot, that if the blank were not filled up, it would be paid to bearer. This bill belonged to the plaintiff, and early in November, 1817, he sent it to Pawsey and Eaton, stockbrokers, that they might sell it on his account, and invest the amount in his name in five per cent. stock. They did not sell the bill or buy the stock, but deposited it with the defendants, who were their bankers, and the defendants, upon the faith of such deposit, carried to the credit of Pawsey and Eaton 800*l.* on the 7th, and 200*l.* more on the 8th November. On the 27th January, 1818, Pawsey and Eaton had exhausted these sums and 300*l.* more to within 46*l.* 10*s.*, and their balance with the defendants still remains unsettled ; and the question is, whether this wrongful deposit by Pawsey and Eaton will give the defendants a right to withhold the bill against the plaintiff, the right owner. Had Pawsey and Eaton sold the

bill to the defendants in the usual and ordinary course of dealing, there can be
*15] no doubt that they *would have had good title to the bill, because Pawsey
and Eaton would have been acting within the scope and limits of the au-
thority conferred upon them by the plaintiff, which was an authority to sell. The
neglect of Pawsey and Eaton to apply the money to the purpose prescribed,
would not have invalidated the defendant's title, unless they had lent themselves
to the fraud of Pawsey and Eaton, because the sale of the bill was to precede
the purchase of the stock, and to be an independent transaction ; and had
Pawsey and Eaton sold the bill, the plaintiff who trusted them with the
application of the money must have borne the loss if they misapplied it. But
though Pawsey and Eaton could have conferred a good title by sale, because
they were authorised by the plaintiff to sell, the question is, could they confer
a good title by deposit ? A pawnee of goods or chattels, or a vendee out of
market overt, has in general no better title than his pawnor or vendor, and can-
not resist the claim of the rightful owner ; but bank notes and bills of exchange
stand upon a different footing in this respect from ordinary goods and chattels.
The holder, bona fide, and for a valuable consideration, of a bank note or bill
of exchange, has a good title against all the world ; because, in the case of bank
notes, they are considered as money, and pass as such, and it is essential for the
purposes of trade, that delivery should give a perfect title, and because in the
case of bills of exchange, this is the law and custom of merchants ; and it makes
no difference in case of bank notes or bills of exchange, whether such holder
has received them as pawnee or otherwise, *Collins v. Martin*, 1 Bos. & Pull.
648. The question here is, whether such a bill as this is to stand upon the
*16] footing of bank notes or bills of exchange, or upon *that of ordinary goods
and chattels, and it seems to me that it stands upon the footing of ordi-
nary goods and chattels, not upon that of bank notes or bills of exchange. The
holder of a bank note or bill has, in general, no muniment to show his title ;
the holder of an exchequer bill generally has the broker's note, stating the fact
and particulars of the purchase. If the holder buys of the government broker,
he gives him a broker's note ; if he buys of any other broker, that broker does
the same. The only case in which he does not buy of a broker and get a
broker's note, is where he exchanges at the Exchequer an old bill for a new
one ; but then he will retain the note for the bill he gave up in exchange. In
this case, therefore, had the defendants asked Pawsey and Eaton for their
broker's note, they would have found they had no title. Bank notes and bills
of exchange are passed from hand to hand, from one proprietor to another, in
all parts of the kingdom, and are used as the media of commercial payments.
The sale of exchequer bills is confined, almost exclusively, to London, and
to one particular part of London, the Stock Exchange. That, as I apprehend,
is the market overt for sale of such bills ; and a sale there will, I take it,
give the same security to the buyer which other sales in market overt give.
There is no market overt for bank notes and ordinary bills of exchange, and
they therefore require a protection which exchequer bills do not. Considering
exchequer bills, therefore, as differently circumstanced from bank notes and
bills of exchange, and upon the same footing as other saleable goods and chattels,
it follows that a pawnee thereof will not have a better title than the pawnor.
The cases to this effect are many, and not disputed. And even if this were
not the case in general, I think it would be so, under the circumstances of this
*17] case. Pawsey *and Eaton were stockbrokers ; the defendants knew
that they were so ; it is part of the business of stockbrokers to sell ex-
chequer bills for others, and when they offered this deposit, the defendants
should have inquired in what character they held this bill ; whether as owners
or as agents, and the result of the inquiry might have been a discovery of the
truth. It was urged in argument that by filling up the blank in the bill, and
making a proper endorsement on the bill, the plaintiff might have prevented the

fraud upon the defendants, and no doubt he might if he had inserted his own name in the blank, and had endorsed it "to the vendee of Pawsey and Eaton," but it does not follow, because he might have prevented fraud by these means, that he is to bear the loss for not having used them. Had such endorsement been usual, the neglect to take the ordinary precaution might have thrown the loss on the plaintiff; but to make him bear the loss, it should be shown that that is a common precaution. I think no stress can be laid upon the memorandum on the bill, "if the blank is not filled up the bill will be paid to bearer;" that does not imply that a *bonâ fide* bearer shall have a right against the proper owner, but that payment, under such circumstances, to the bearer, should discharge government. I lay no stress upon *MacLish v. Ekins*, Say. 73, because there the bill was payable to plaintiff or his assigns, and the plaintiff had never endorsed or assigned it, or authorized an assignment. In *Goldsmyd v. Gaden*, 1 Bos. & Pull. 649, the broker had bought the navy bills and scrip, as agent for the defendants, and they left the navy bills and scrip in his possession; so that he had all the muniments of title, *and common inquiry would not [*_18 have detected his want of title, and it was from want of proper caution, viz. the taking of the possession of the muniments from him, that he was enabled to impose upon the plaintiffs. Upon the whole, on the ground that exchequer bills are not bills of exchange; that it is not necessary for the purposes of trade that they should stand on the same footing as bills of exchange; that in the case of exchequer bills, there are muniments of title, which will show in whom the title is; and that the defendants were guilty of negligence in not ascertaining whether Pawsey and Eaton had the proper muniments of title; I am of opinion, that they have no right to these bills, and that the plaintiff is entitled to recover.

ABBOTT, C. J. I am of opinion that a nonsuit ought to be entered. The question in the present case is, whether the transfer of the property in an exchequer bill is to be governed by those rules, which regulate the transfer of property in bank notes and bills of exchange, originally made payable to the bearer, or become so payable by the effect of an endorsement, according to the custom of merchants; or by those rules which regulate the transfer of the property in goods and chattels. If by the former, the authorities are clearly against the plaintiff; if by the latter, they are as clearly with him. Upon this question my mind has fluctuated; but I am ultimately of opinion that the transfer is to be governed by those rules, which apply to notes and bills of exchange. I do not rely upon the case of *Goldsmyd v. Gaden*, cited in 1 Bos. & Pull. 649, because the facts of that case are not given with sufficient fulness and perspicuity to enable me to judge of *the ground and principle of the [*_19 decision. But, abstracted from authority, I think this instrument is of the same nature as notes and bills of exchange. Like them, it is neither valuable nor useful in itself, as goods and chattels, such as a horse, a book, a picture, or a pipe of wine, are; it is valuable only as entitling the holder to receive, at some future time, a certain sum of money, which is a value precisely of the same nature as the value of a note or bill. Notes and bills have been distinguished from goods in regard to their transfer, for the convenience of trade and commerce, and in regard to their being mercantile and commercial instruments, and by law negotiable. It may be true, that exchequer bills are not so frequently negotiated, in fact, as some other bills or notes; but I think we are to regard the negotiability of the instrument, and not the frequency of actual negotiation; exchequer bills are not made for very small sums, and on that account alone they would not become the subject of frequent actual negotiation. A bank note for 5000*l.* passes through very few hands; a bank note for 5*l.* usually passes through a great number. Many country bank notes have no ordinary circulation beyond a very narrow district. Bills of exchange usually pass through very few hands;

but the character of these instruments is in no degree affected by those circumstances. In the case of *Grant v. Vaughan*, 3 Burr, 1526, which arose upon a draft on a banker, payable to the ship Fortune or bearer, the court held that it ought not to have been left to the jury to say whether such drafts were in fact and practice negotiable, for that the question whether a bill or note be negotiable or not is a question of law. And upon such a question *20] of law, *regarding an exchequer bill, I should, looking at the form of the instrument, and observing that the money is to be payable to the bearer, answer, that it is by law negotiable. I believe, also, that exchequer bills are in fact negotiated in like manner as other bills or notes, though not to the same extent, or among all people generally, but confined chiefly to those who deal in money. And I have already said, that I think the frequency or extent of actual negotiation is not to be regarded. It was objected, however, at the bar, that there are words which show, that this instrument was not to be negotiable before the fifth of April, which day had not arrived when it was deposited with the defendants. But I think the words have no such import. They are affirmative that the bill will be received as a payment at the Exchequer after the fifth of April, which may reasonably lead to a conclusion in the negative, that it will not be received in payment *there* before that day. But compulsion to receive an instrument in payment is not by any means requisite to give to it the character of a negotiable instrument. No man is compellable to take a bill of exchange in payment. It was also objected, that exchequer bills are the subject of sale, and usually are transferred by sale. This is true in fact, but I think the fact does not affect the character of the instrument; for bills of exchange also are often made the subject of sale, and are actually transferred by sale. For these reasons, I am of opinion that exchequer bills are negotiable, and may be transferred in the same manner as bills of exchange; and that in those bills, as in bills of exchange, the property passes with the possession by every mode of transfer, fraud and collusion apart. And I think this opinion *21] is most consonant to *public policy, which requires the utmost facility of transfer, because the value is in some degree increased thereby; though I should not think myself justified in deciding the case upon the ground of public policy alone. It will be understood that I have been speaking of exchequer bills, in which the blank is not filled up with any name, and which, therefore, according to the note at the foot, are to be paid to the bearer.

Judgment of nonsuit.

BATSON and Others v. DONOVAN and Others.

A carrier had given notice that he would not be answerable for parcels of value, unless entered and paid for as such. and the plaintiffs, with the knowledge of this, delivered a parcel, containing bank notes to a large amount, without informing the carrier of its contents. The coach in which the parcel was conveyed, was left, at midnight, standing for some time, in the middle of a very wide street, with a porter, who was ordered to watch it; during this time the parcel was stolen. At the trial, two questions having been left to the jury, first, whether the plaintiffs had been guilty of any unfair concealment, by not informing the carrier of the nature and value of the parcel, and, secondly, whether the carrier had been guilty of gross negligence: Held, by three judges, (Beatt, J., dissentiente,) that the direction to the jury was right.

DECLARATION against the defendants, as common carriers, to recover the value of a parcel, containing 4072*l.* in bank notes and bills of exchange, delivered to them for the purpose of being conveyed from Berwick-upon-Tweed to Newcastle-upon-Tyne. Plea not guilty. At the trial, before BAYLEY, J., at the Northumberland Summer assizes, 1819, the jury found a verdict for the defendant. The facts of the case, and the points left to the jury by the learned judge, are very fully stated by him, in delivering his opinion; and, therefore,

it becomes unnecessary to state them here. A rule *nisi* for a new trial having been obtained in last Michaelmas term,

Cross, Serjt., in Trinity term last, showed cause. The defendants, in this case, by their notice, have *declared, that they would not be liable for parcels of a certain value, unless they were entered and paid for accordingly. The plaintiffs, who had frequently sent parcels of value by the defendants, and paid for them as such, did not deal fairly with them, in concealing from them the value of the parcel in question. By that concealment, they deprived the defendants of the increased remuneration, which they were entitled to for the increased risk. In *Tylly v. Morrice*, Carthew, 485, the plaintiffs had delivered to a common carrier a bag, sealed up, which they represented to contain 200*l.*, but which, in fact, contained 400*l.* The carrier received 10*s.* per cent. for the carriage and risk of the 200*l.* It was ruled at *nisi prius*, that the carrier was answerable only for the 200*l.*, because the undertaking was for the carriage of 200*l.*, only, and his reward was to extend no further than that sum, and it is the reward which makes the carrier answerable; and, since the plaintiffs had taken this course to defraud the carrier of his reward, they had barred themselves of that remedy, which is founded only on the reward. In *Gibbon v. Paynton*, 4 Burr. 2298, 100*l.* hid in hay, in an old nail bag, was delivered to a carrier, he having given public notice, knowledge of which was traced to the plaintiff, that he would not be answerable for money and jewels, without notice; it was held, however, that the carrier was not answerable, because the plaintiff had been guilty of a fraud, in concealing the money from the carrier. *Nicholson v. Willan*, 5 East, 507, is an authority to show that such notices are legal. In *Beck v. Evans*, 16 East, 244, it was held, that the carrier did not by these notices, protect himself from the consequences of *his own misfeasance; here, however, the loss has arisen from the negligence of his own servants, one of the ordinary risks to which a carrier is subject, and from the consequences of which he must have intended to protect himself, in cases of parcels of value, by his notice. The cases decided on the subject of concealment, with respect to policies of insurance, apply to the present case, for this is in the nature of insurance. Now if the assured conceal from the underwriter any fact within their knowledge, materially varying the nature of the risk, the policy is void. The question whether a carrier has been guilty of gross negligence, must, in some degree, depend upon the value of the property committed to his care; and, therefore, the knowledge of that value is to him of the utmost importance; for that which might be considered sufficient care, with respect to property of ordinary value, might justly be considered insufficient in the case of money or jewels.

Hullock, Serjt., *J. Williams*, and *Holt*, contrà. This verdict cannot be supported, because the carrier is responsible for all losses happening through his personal default, although he may have given notice that he will not be answerable for parcels of a given value. The first question left to the jury in this case, assumes, that persons sending articles of value, are bound to give notice of the value to the carrier. That proposition, however, is not supported by any decided case, nor is it recognised as the law of England, by any text writer. The exceptions to the common law responsibility of carriers, are, where the loss proceeds from the act of God or the king's enemies, to which, perhaps may be added, those cases were a party delivering goods to a carrier, fraudulently conceals from him their *value, and thereby deprives him of his reward. In *Kenrig v. Eggleston*, Aleyn, 93, the plaintiff delivered a box, containing 100*l.*, to the carrier, telling him only that there was a book and tobacco in the box; and *Rolle*, C. J., held, that the carrier was answerable, for he need not inform the carrier of all the particulars of the box, but it must come on the carrier's part, to make special acceptance. In *Morse v. Slue*, 1 Ventris, 238, a box with a large sum of money was brought to a

carrier, who asked the owner what was in it; he answered, that it was filled with silks and such like goods, of mean value, upon which the carrier took it, and was robbed; it was held, that he was liable, but it was said, that if the carrier had told the owner that it was a dangerous time, and if there was money in it, he durst not take charge of it, and the owner had answered as before, this would have excused the carrier. These cases are authorities to show, that the carrier, in order to excuse himself, must make a special acceptance. It is true, indeed, that Lord MANSFIELD, commenting in these two cases in *Gibbon v. Paynter*, said, that he did not agree in the doctrine there laid down, for he considered them both as cases of fraud. That was also a case of fraud, and the means used to impose upon the carrier, were equivalent to an actual representation, that the bag contained nothing but hay. Here there is no imputation of fraud; negligence in the plaintiffs or their servants, in not communicating the value of the parcel, is alone insinuated; and the doctrine, therefore, laid down by Lord MANSFIELD, in the case last cited, does not apply here. If it be the duty of a party to notify to a carrier the value of a parcel, *how is it possible to draw a line between those cases, where such notice is necessary and where it is not? Must notice be given when the parcel contains linen or muslin, or silk, or only when it contains money or jewels. The safe rule to lay down is, that carriers are always liable, except in the case of fraud. Secondly, it is clear, that a carrier is liable for the consequences of his gross negligence, notwithstanding he may have otherwise restrained his responsibility by notice; for it has been expressly held, that these notices only go to protect him in cases of ordinary accidents, and not from the consequences of his own misconduct. *Beck v. Evans*, 16 East, 244; *Bodenham v. Bennett*, 4 Price, 31; *Berkett v. Willan*, 2 B. & A. 356, are authorities in point, and that being so, it follows, that if the defendants were guilty of gross negligence, the plaintiffs were entitled to recover, although they had not disclosed to them the value of the parcel. They then argued, from the facts proved at the trial, that there had been such negligence in the defendants.

Cur. adv. vult.

The case stood over until this term, when there being a difference of opinion on the bench, the judges delivered their opinions *seriatim*.

BEST, J. This action was brought against the defendants, as common carriers, to recover a compensation for the loss of a box, containing bills and bank notes to the amount of 4072*l.* which had been lost out of a stage coach, of which they were the proprietors. The defendants had given notice that they would not be *answerable for parcels of value, unless entered and paid for as such. The plaintiffs knew of this notice. The box was left with one of the defendants, at Berwick, and booked. Nothing was said at the time of the booking, but that it was *the box* for Newcastle. The box was addressed to Wm. Batson and Co., Newcastle, and had on it a brass plate with the words "Batson and Co.", William Batson and Co. were bankers, both at Berwick and Newcastle. The coach arrived at Berwick at twelve at night, and remained half an hour in the *middle* of the street, which is of the width of 80 yards. About a quarter after twelve the box was put into the boot of the coach. A porter was ordered to watch the coach; but this person was at a considerable distance from it, and was so inattentive to his duty that the box was stolen from the coach whilst it was so left in the street, and so watched by the porter. My brother BAYLEY (who tried this cause) left two questions to the jury, viz. 1st, Whether the plaintiffs dealt fairly by defendants in not apprising them that the contents of the box were of great value; 2dly, Whether there was in the conduct of the defendants gross negligence. My learned brother told the jury that if they thought the concealment on the part of the plaintiffs was unfair, or that the defendants were not guilty of gross negligence, they should find for the defendants.

My single opinion will not affect the rights of these parties; but I feel it my duty to make my humble protest against the introduction of what I think a new principle in the law relative to carriers, viz. that the owner of a parcel of value, such parcel having nothing in its appearance indicative of its contents being of small value, is bound, unasked by the carrier, to state what is its worth. I *am also bound to declare, that the directing the jury that they must find [**27] a carrier guilty of negligence without any qualification or explanation of what is meant by these terms before they fix him with the loss of a parcel is going much further in his favour than, I think, his liability under the law will warrant. I know of no case in which a judge has told the jury that they are to consider whether the owner of a parcel made a proper disclosure of the nature of its contents, either to a carrier or innkeeper. The novelty of such a direction is of itself sufficient to make me pause before I admit its propriety. A carrier who has given no notice is an insurer. Now if a man caused an insurance to the amount of 100*l.* to be effected upon a thing worth 20,000*l.*, can it be said that it is necessary, at the time of effecting the policy, to state to the underwriter the value of the thing insured? Yet the large value in a small compass may tempt thieves to make attacks in rivers and harbours as well as on stage coaches. If the underwriter or carrier want information, they must ask it; and, according to their discretion, protect themselves by warranties or special acceptances. What is to be considered as a parcel of such value, or what are particular articles that require caution to be given to the carrier? Must it be of the value of 1000*l.* or 100*l.* or 10*l.*? Must it contain jewels or gold? or is the carrier entitled to this indulgence in case a package contains silver, or silks, or laces? None of these points have ever been settled, and they would have been settled long ago if this direction had been usual and proper, and then the decision would have been matter of law for the judge, and not of fact for the jury. If any fraud be practised on the carrier, the case would *be different; but I cannot consider the non-communication of the contents [**28] of a box as any thing like fraud. Any artifice to give the box containing the things of value a mean appearance, and thereby to induce the carrier to think it of no value, and so prevent him from making inquiries, would, I think, be pregnant proof of fraud. Before it was the practice for carriers to give notice, that they would not be answerable for parcels above a certain value, unless entered and paid for according to their value, a carrier was an insurer against all losses, except such as were occasioned by the act of God, or the king's enemies. This responsibility (as it is said in all the old books) *was in respect of his reward.* That reward must vary, not only according to the weight and dimensions of the parcel and the distance it is to be carried, but also according to its value. The carrier is entitled to have this reward paid to him before he takes the package into his custody. He always was at liberty to make a special acceptance of the goods, and to introduce into the terms of such acceptance any reasonable condition not inconsistent with his duty to the public. To enable him to make a proper charge for the carriage, he is entitled to ask of the owner what is the value of the parcel. If these are his rights, is it not his duty to make these inquiries? and is he not, like persons in any other station, bound to know the duties belonging to that station? Has he then any right to complain that information was not given him when he did not do what he was bound to do to obtain that information? If carriers will make the proper inquiries of those who employ them, they will find they may protect themselves against frauds and accidents more effectually than by notices; for if the answers to inquiries represent the *contents of a package as of less [**29] value than they are, the carrier will not be liable for more than the value stated by the owner. If the representation be true, he knows the degree of care that such a package requires, and what he may reasonably demand as a compensation for that care, and the risk that he must run in carrying the parcel.

Supposing, therefore, the defendants had given no notice, the plaintiffs, unasked by the defendants, were not bound to say a syllable as to the value of the box. The only effect of the notice is to prevent the necessity of a particular inquiry in each case. By these notices their employers are informed that carriers will not be insurers for goods above a certain value, unless paid a reasonable premium of insurance. But these notices do not affect their responsibility as to negligence or misfeasance. It has been said at the bar, that if the carrier is informed that it is a parcel of great value, he will be more careful of it. I have already said, that if there had been no notice, and the carrier stood in the situation of an insurer, and he wished to proportion his care to the value of his charge and the greatness of his responsibility, he is not entitled to such information respecting a package, unless he thinks proper to ask for it. The notice renders any information as to the value of no importance. Having given such a notice, he is no longer an insurer, except of parcels under the value of 5*l.* Whatever be the value of a parcel delivered to a carrier, who has given such a notice, if he and his servants pay that attention to the safety of his carriage and the packages in it, that a coach loaded with packages, each being under 5*l.* value, requires, he is free from all responsibility. If he or his servants fail to *30] pay that attention, and a parcel should be lost in consequence of the negligence, for that negligence he is responsible, whatever be its amount. With the greatest deference to my learned brother who tried this cause, the jury (being told that they were only to consider the value of the box when they were deciding on the damages to be given) should only have been asked whether they thought the defendants had sufficiently guarded a coach containing many parcels, each of small value, whilst it was left without horses in the street at Berwick. On the second point, I am of opinion that the jury should have had some explanation of what is meant by *gross negligence*. Without some explanation, they would think that it means conduct highly blameable. Yet something much short of that sort of conduct will be sufficient to make a carrier responsible. He and his servants must take all the care that is necessary for the preservation of the property committed to his charge. They must take the same care of it that a prudent man would take of his own property. This is the law with respect to all bailees for hire or reward. Can I say that such care was taken of this property when I find the coach was left in such a situation in the street, that the owners thought it right to place some one to watch it, and that person was either at so great a distance from the coach, or so inattentive to his duty, as to allow persons to go to the coach and steal the box. *Gibbon v. Paynton*, 4 Burr, 2298, has been referred to; but there is this difference between that case and the present, namely, that in that case the gold was packed in an old nail bag, which was stuffed with hay to give it a mean appearance. The whole court *very properly considered that this mode of packing so valuable an article was a fraud, and gave their judgments expressly on that ground. There is a difference between silence and any act done to conceal. The latter may be fraudulent; the former never can. This is a case of silence only. For these reasons, I am of opinion that there ought to be a new trial.

HOLROYD, J. If the carrier had given no notice in this case, that he would not be answerable for parcels of value, it seems to me that it would not have been the duty of the plaintiffs, when they brought goods to him, to specify their quality or value; for then it would have been his duty to make inquiry, if he either wished to have a reward proportionate to their value, or to know whether they were goods of that quality for which he had a sufficiently secure conveyance; for if he had not, he might lawfully have refused to take them. In this case, however, the carrier had, by his notice, expressly refused to accept parcels of value without being paid for them accordingly. The reason for his giving such notice is, on account of the risk in the carriage, that he may claim

an adequate reward for it, and also that he may use due care and be provided with sufficient means to guard against any loss. With respect, therefore, to the goods which he takes, he requires a remuneration in proportion to the value. Now the plaintiffs, knowing this, delivered the box in question, containing notes and bills, which the carrier had, by his notice, refused to take, unless entered and paid for accordingly, and they delivered it without giving him any information as to its contents. They held it out, therefore, to him as an ordinary article, which he would have no objection to take as of course. That is a [**32 material circumstance in this case, and makes it very distinguishable from those cases where no notice is given by the carrier, or if given, is not known by the plaintiffs; for unless the notice had been brought home to their knowledge, they would be in the same situation as if there had been no notice at all. In cases where the carrier has not given notice, or where the notice does not come to the knowledge of a plaintiff, he holds himself out, as a common carrier, to take goods in general; and he would then be bound to inquire the value, either if he expects an additional reward, or if he has any objection to carry any particular article. But that reason does not apply to a case where the owner of the goods had notice that the carrier would not be responsible for goods of a particular description. Perhaps, indeed, the carrier might not have a right absolutely to refuse taking goods of this description. I by no means say that he has. It has been laid down, that where a carrier has convenience to carry goods, he cannot refuse to take the goods of any particular person; and, possibly, an action might lie against him if he refused to take such goods, without a sufficient reason for the refusal. It would, however, be a reasonable excuse for not carrying goods of great value, either if it appeared that the carrier did not hold himself out as a person ready to convey all sorts of goods, or that he had no convenient means of conveying with security such articles. And so it was held in *Jackson v. Rogers*, 2 Show. 327. Here the plaintiffs knew that the carrier refused to take goods of this quality, unless entered and paid for accordingly; and yet they delivered *them as things which the carrier was to take as of course. Now, I think [**33 it was the duty of the plaintiffs, in bringing such articles to the carrier, not to deliver them as ordinary goods, but to inform him of their nature and value; and the not doing so appears to me as direct an act of concealment as that in the case of *Gibbon v. Paynton*, where the circumstance of placing money and other valuable articles in hay, so as to make the carrier believe that no such articles were there, was held to be a fraudulent concealment. For a concealment may be effected not merely by direct acts done by a party himself; but likewise by his not doing what it is his duty to do, and, by that, deceiving the person to whom he brings the goods. Here, the owner of this valuable property delivered it as an article requiring no extraordinary care; he held out, therefore, to the carrier, as plainly as if he had told him so, that these were goods which the carrier would not object to take on the ordinary terms, and that he was to consider them as such. The carrier had, then, every reason to think that they were articles to which the notice did not apply; for, otherwise, he would have had a right to expect that their quality would be specified. And why was the nature of the goods not mentioned? Because the carrier would either have refused to take the goods, or, if he did consent to carry them, would have demanded a higher premium. The owner of the goods, therefore, withheld that knowledge which it was his duty to have given, and that in point of law was a concealment on his part. Then the question arises, whether there was a mis-direction. The learned judge left two points to the jury; 1st, Whether there was negligence in the plaintiffs' not specifying the contents of the *box to the carrier; 2dly, whether there was gross negligence in the defendants. With respect to the first, I think it was the plaintiffs' duty to specify the contents, and that it was a fraud and deceit in law on his part in not

doing so. In my opinion, the carrier cannot be considered as having consented to receive and carry these articles, by reason of the notice which he had given, and his ignorance of their quality. I think, therefore, he is not answerable as a carrier, nor even as a bailee, on account of the legal fraud of which the plaintiffs were guilty. The maxim, "Ex dolo malo non oritur actio," applies to this case. The second question is, Whether there was gross negligence on the part of the defendants. I think that question was properly left to the jury, and that we cannot say, upon the evidence, that they have drawn a wrong conclusion. I think, therefore, that the verdict ought to stand.

BAYLEY, J. The box, in this case, contained bills, checks, and notes of the value of 4072*l.* The defendants had given notice that they would not be answerable for parcels of value unless they were entered and paid for as such. The plaintiffs knew of this notice. The box was left with one of the defendants at Berwick, with no other observation than this, "It is the box for Newcastle." Nothing was said as to what it contained, nor did any of the defendants know it contained articles of value. It was directed, "Wm. Batson, Newcastle," and had on it a brass plate, "Wm. Batson and Co.;" it was locked and cored, not sealed. W. Batson and Co. were bankers at Berwick and Newcastle. The coach arrived at twelve, and stayed at Berwick half an hour;

*35] it stood in the middle of the street, about thirty yards from the "pavement.

About a quarter after twelve, the box was put into the boot of the coach, and a porter watched the coach; but he was not so attentive as he might have been, and the box was probably stolen from the boot whilst he was upon the watch, by some person who contrived to elude his notice. The horses were brought to the coach about ten minutes after the box was put in, and till that time nobody was with the coach, except the porter. There was no *misfeasance* in the defendants or any of their servants. I left, I believe, these two questions to the jury. First, whether the plaintiffs dealt fairly by the defendants, in not apprising them that the box contained articles of value; and, secondly, whether, in the case of a parcel of such value as the defendants might fairly expect this to be, there was gross negligence in the defendants; and I rather think I left those questions in such a way, that unless the jury were with the defendants on both, they should find for the plaintiffs; but I am not confident upon that point. And unless the first of these points, that the plaintiffs did not deal fairly by the defendants, in omitting to apprise them of the value of the box, will, under the circumstances of this case, sustain the verdict, I think there ought to be a new trial. This was a case of negligence only, not of misfeasance. Such want of fair dealing on the part of the plaintiffs is an answer to the action. There may be two objects in such a notice as this; the one, to secure to the coach-proprietor a compensation proportional to his risk; the other, to enable him to put parcels of the greatest value in a place of the greatest security. The risk upon a parcel of great value, is greater than that upon a small one. The value is a temptation to thieves to make attempts,

*36] which, but for that value, they would not *make. The omission, therefore, to apprise the coach-proprietor of the value, operates in two ways. It deprives the proprietors of the extra compensation they ought to have, and it prevents them from taking that extraordinary caution which, upon a parcel of extraordinary value, they naturally would take. The value is an ingredient to be taken into consideration upon the question of gross negligence; for that may be gross negligence in the case of a parcel of extraordinary value, which, in the case of another parcel, would not be so. The trusting a parcel of 5000*l.* or 10,000*l.*, for a moment, out of the personal care and superintendence of a trustworthy servant, would, if it were stolen during that interval, be gross negligence; but the trusting a parcel of 40*s.* value in the same way would not. Why? because parcels of great value are a great temptation to thieves to be on

the watch for them ; parcels of small value are not. In the case of a box or parcel known to be of great value, the proprietors may take the extraordinary care of putting it into the personal charge of the coachman or guard, or even of sending a special messenger with it, or going with it themselves ; and these are precautions which, in the case of a thing of ordinary value, they would not think of taking. Now, if a plaintiff, by omitting what he ought to do, prevents a defendant from taking that extraordinary care which, but for that omission, he probably would have done, has he a right to complain ? To what is the loss to be ascribed ? To his omission. It is upon him, therefore, that the loss ought to fall. Had the defendants been apprised that this box contained the value of 4072*l.* ; that so very large an inducement was held out to thieves, and that the loss of it would make them answerable to that extent, can any ^{*one} believe that they would not have taken more care of it, than they did ? [37] Then the persons who prevented them from taking this extra care, viz. the plaintiffs, ought to bear the loss. Again, if this parcel had been of the value of 5*l.* only, it probably would not have been lost. The temptation to thieves would have been less. The value, however, makes it above an ordinary risk. Now the holding out as an ordinary risk what is really an extraordinary one, is a legal fraud, "dolus malus," and, "ex dolo malo non oritur actio." A carrier is, to a certain extent, an insurer, and concealment, if it varies the risk, discharges the underwriter. The value here does increase the risk ; that value is concealed, it is concealed wrongfully ; then why is the defendant to be liable ? The case of *Gibbon v. Paynton*, Burr. 2298, seems to me to come very near the present case. There 100*l.* was hid in some hay in an old nail bag, and was sent by the coach. The proprietor had given a notice that he would not be answerable for money, unless he had notice what it was ; the plaintiff knew of the notice, but did not apprise the proprietor that there was money in the bag. The jury found for the defendant ; and on a rule nisi for a new trial, and cause shown, the court held the verdict right. Lord MANSFIELD said, "A common carrier, in respect of the premium he is to receive, runs the risk of goods, and must make good the loss, though it happen without any fault in him, the reward making him answerable for the safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionate to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, ^{*and be at the expense of more} guards or other methods of security ; consequently, if the owner of the [38] goods have been guilty of a fraud upon the carrier, such fraud will excuse the carrier. And here the owner was guilty of a fraud upon him : he meant to cheat him of his hire." Mr. Justice YATES said, "A common carrier insures goods, but he ought to be apprised what it is he undertakes, and then he will, or, at least, *may*, take proper care. But he ought not to be answerable where he is *deceived*. Here he was deceived." Mr. Justice ASTON said, "It manifestly appeared that this was money sent under a concealment of its being money. The true principle of a carrier's being answerable, is the reward ; and a higher price ought, in conscience, to be paid him for the insurance of money, jewels, and valuable things, than for insuring common goods of small value :" and the rule was discharged. This case comes so near to the present, that I can hardly distinguish it. The plaintiffs here concealed ; the defendants had not their due reward ; the defendants were deprived of that which, according to this case, is the foundation of the carrier's liability, viz. a reward proportionable to the risk ; and by not being apprised of what they received, they were not put upon their guard to take what, with reference to this article, would have been proper care. In *Clay v. Willan*, 1 H. Black. 298, where the notice was that cash would not be accounted for, if lost, of more than 5*l.* value, unless entered, and one penny insurance paid for each pound value, and the plaintiff

knowing of the notice, sent a parcel of light guineas, without stating what they were, the defendants were held not to be liable, even to the extent of 5*l.* The *39] *reasons are not given, but it probably went upon the construction of the notice. *Izett v. Mountain*, 4 East, 371, is exactly to the same effect. In *Clarke v. Gray*, 6 East, 564, a notice "that no more than 5*l.* will be accounted for, for any goods or parcels, unless entered as such, and paid for accordingly," was held to leave the carrier liable only to the extent of 5*l.* in respect of goods of higher value. In *Harris v. Packwood*, 3 Taunt, 266, LAWRENCE, J., noticed at the trial, that there was good reason why a carrier should be made acquainted with the value of the goods, that he might take the greater precaution against fire, or greater force to resist felons; and on the rule nisi to enter a nonsuit, HEATH, J., observed, that in some carriages there are particularly safe places to deposit jewels and articles of superior value, when known to be such; and LAWRENCE, J., said, there was nothing unreasonable in a carrier requiring a greater sum, where he carried goods of a greater value, for he is to be paid not only for his labour in carrying, but for the risk he runs, which is greater in proportion to the value; and the defendant having given a notice, which the plaintiff knew, the rule was made absolute for a nonsuit. *Bignold v. Waterhouse*, 1 M. & S. 255, contains a similar doctrine; but there was another point, that the contract was with one of the defendants alone, and not with the firm, and, on that ground alone, Lord ELLENBOROUGH's opinion proceeded. These authorities induce me to think, that the defendants had a right to be apprised by the plaintiffs, that this box contained articles of value, and that the plaintiffs' neglect in this case, there being no misfeasance on the part of the defendants, is an answer *40] to the action. The authorities *relied upon for the plaintiffs, are, as it seems to me, cases of misfeasance. *Ellis v. Turner*, 8 T. R. 531, was the case of wrongfully carrying the goods beyond the place at which they were to be delivered; they were to be delivered at Stockwith, between Hull and Gainsborough, and were carried beyond Stockwith. *Beck v. Evans*, 16 East, 244, is put by Lord ELLENBOROUGH, distinctly, as a case of *misfeasance*: there the carrier wrongfully drove on a cask of brandy, when he was told it was leaking. *Birkett v. Willan*, 2 B. & A. 356, was a case of misfeasance also, for that was a wrongful delivery to a person who had no colour for receiving. In *Bodenham v. Bennett*, 4 Price, 31, the defendant's bookkeeper knew at the time he received the parcel that it contained Welch notes, and yet he demanded no extra payment: it did not appear that plaintiffs knew of the notice, and the court thought that the parcel was carried beyond its destination, which would make it a case of misfeasance. In *Smith v. Horne*, 2 B. Moore, 18, the parcel was not of extraordinary value. The question of fair dealing, in not specifying the value, was never raised, and the defendants sent their goods for delivery in London by a cart, which had only one person to attend it, which might be deemed misfeasance, it being the general custom to send two persons with such carts. Upon the ground, therefore, that the defendants ought to have been apprised of the value of this box, and were not, that the plaintiffs were guilty of misconduct in this respect, that the plaintiffs' neglect deprived the defendants of the compensation they ought to have received, and prevented the defendants from taking the care which they otherwise would have done, and that the value *41] of *the parcel increased the probability of loss, I am of opinion that the plaintiffs' neglect is, under the circumstances of this case, a bar to the action.

ABBOTT, C. J. I am of opinion that the case was properly left to the jury by my learned brother at the trial, and I think the verdict of the jury warranted by the evidence. It is unnecessary for me to repeat the facts. The main objection to the judge's direction is, that he desired the jury to consider whether there had been any thing like unfair dealing or want of proper caution on the part of the plaintiffs. It cannot be denied, that if the owner of goods deceive

the carrier as to their quality and value, he shall not hold the carrier responsible. This is laid down in *Gibbon v. Paynton*, 4 Burr, 2298, and the cases there cited. In that case money was sent hid in hay in an old nail bag, by a person who did not disclose the contents of the bag, and was not asked to do so, and who knew the carrier had given notice that he would not be answerable for money, unless he should have notice that money was delivered to him. In the present case, bank notes, in a box, are delivered to a carrier, without disclosing the contents of the box, the carrier having given notice that he will not be answerable for notes unless entered and paid for accordingly, and the plaintiff being acquainted with such notice. Thus far, therefore, the two cases appear to me to be very little different from each other. In the case of *Gibbon v. Paynton*, however, there was no proof of particular negligence on the part of the carrier; whereas, in the present case, it is contended, and probably rightly so, that there was *great negligence on the part of the carrier; the coach having been [*42 left standing for some space of time at midnight in the middle of a wide street, and no guard or watchman within some yards of it, the box in question having been put into the boot. And it was contended, that for such gross negligence the carrier must answer, notwithstanding his notice, and the manner in which the box was delivered to him; and the case of *Bodenham v. Bennett*, was cited and relied upon. But in that case there was reasonable evidence that the driver knew the quality of the parcel; in the present case, I think such evidence is wanting. Now the degree of care that a man may be reasonably required to take of any thing, depends, in my opinion, upon the quality and value of the thing, and the temptation thereby afforded to theft. *Magni pericolo custoditur quod multis placet.* And it cannot, I think, be denied, that a small box containing bank notes or money affords much greater temptation to theft than a parcel of equal size containing less valuable articles, or a larger and more bulky parcel of considerable value, a small box being a thing easily removed and concealed, and notes being things easily disposed of, and made profitable to a thief. If the carrier had known the contents of this box, he certainly ought to have placed it in a less exposed part of his carriage, or to have caused the carriage to be better watched; he ought to have done so; probably he would have done so: I cannot take upon myself to say that he would not. And I think an opportunity of doing so ought to have been given to him by some intimation of the contents of the box that he was required to convey. The negligence of the servants of common carriers has been for a long time a subject of frequent and just complaint, and it is the *duty of courts, as far as shall be consistent with justice and law in each particular case, to follow up [*43 the good old principle of the common law, and do every thing that may induce greater care and attention. But we must not, where a notice like the present has been given, require more care at their hands than may reasonably be required, adverting to all the particulars of the case before us. And I think we should do this, if we were to say that the jury might not have been reasonably desired to consider the conduct of the plaintiffs in this transaction, or that the conclusion which the jury have drawn in favour of the defendants was not reasonably warranted by the evidence before them. I am, therefore, of opinion that the rule ought to be discharged.

Rule discharged.

HOLROYD v. BREARE and HOLMES.(a)

In trespass, two defendants appeared by the same attorney, and pleaded, 1st, general issue, and 2d, separate justifications. A. obtained a verdict generally, and B. obtained a verdict on his justification, but the plaintiff succeeded against him on the general issue: Held, 1st, that B. was not entitled to any costs on the issue found for him; 2d, that the master, in taxing

(a) See the facts of this case corrected in the last page of this volume.

A.'s costs, was right in allowing only one-half of the attorney's costs for appearance, &c.; 3d, that the costs due from the plaintiff to A. could not be set off against the costs due from B. to the plaintiff.

PARKER had obtained a rule nisi, for referring it back to the master, to review his taxation of costs in this cause. It was an action of trespass against the two defendants, who pleaded, first, the general issue, and, secondly, separate justifications. At the trial, a verdict was found for the defendant, Breare, generally, and against the defendant, Holmes, upon the general issue; but for him, upon his plea of justification. Three points were made, in the application for a rule nisi: *First, that the master had improperly allowed to Breare only half costs, in consequence of his having appeared by the same attorney, as Holmes. Secondly, that the master had allowed the plaintiff full costs against Holmes, but had refused to allow to Holmes the costs on the issue found for him; and, thirdly, that the costs allowed to Breare ought to be set off against those to be paid by Holmes.

Tindal now showed cause, and contended, as to the first objection, that in this case, the master had followed the ordinary course, and that being a reasonable one, the court would not, upon the present occasion, make any rule to alter it. As to the second point, he relied upon *Postan v. Stanway*, East, 261, as expressly in point. As to the third point, if the set-off contended for were allowed, it would deprive the plaintiff's attorney of his lien; and he cited *Mordecai v. Nutting*, Barne, 145.

Parke, in support of his rule, stated, that he did not mean to press the first point, which was entirely a matter for the discretion of the court. As to the second point, he admitted, that he could not distinguish the case from *Postan v. Stanway*. If, therefore, the court felt themselves bound by that authority, the rule, upon this point, must be discharged. But in that case, the judgment of Lord ELLENBOROUGH proceeded entirely upon the practice of the court. This, however, is not a matter of practice, but a right, depending on the true construction of the statute 23 Hen. 8, c. 15, s. 1. If, therefore, the court see, *45] that the construction hitherto adopted in practice, be wrong, they will, notwithstanding the practice, give to the defendant that which is his right. The words of the statute are, "That if any verdict happen to pass, by lawful trial against the plaintiff, in any action, the defendant shall have judgment to recover his costs; and the statute of 4 Jac. c. 3, which extended the statute of Hen. 8, is to the same effect. Now here, there was a verdict upon the justification; and the defendant, therefore, is entitled to have judgment entered for him for those costs. It may, however, be said, that the statute only applies to cases where the plaintiff obtains no verdict, and that it would be inconsistent to have two judgments on the record. But *Day v. Hanks*, 3 T. R. 656, is an authority to the contrary of the first of these objections, and *Winnard v. Foster*, 2 Lutw. 1190, shows, that two judgments may be entered upon the record; and these authorities were not referred to and fully considered in *Postan v. Stanway*. As to the third point, the lien of the attorney applies only to cases where there are distinct actions, but not to a claim of set-off, where the whole arises in the same action; and he referred to *Schoole v. Noble and Others*, 1 H. Bl. 23, and *Cawthorn v. Thompson*, Hullock on Costs, 471, 2d ed.

BAYLEY, J. The principal question in this case is, whether or not the court now may give a judgment for costs to be paid by the plaintiff to the defendant, upon the issues found for him, as well as a judgment for the plaintiff for his damages and costs. Now that question, as it seems to me, was expressly determined in the case of *Postan v. Stanway*, where the defendant, having *46] pleaded three pleas, two issues were found for the plaintiff; and on the third issue, which applied to a part only of the plaintiff's demand, a verdict was found for the defendant. It appeared, therefore, that the plaintiff had, upon the third issue, unnecessarily carried the defendant down to trial. The

court entered into the question, and decided, that the defendant was not entitled to have any judgment entered for him. That has been the course of proceeding in this court, as far back as memory or precedent can go. No instance to the contrary has been cited, except *Winnard v. Foster*. That, however, was a case of replevin, where both parties are actors; and there the defendant, as it appeared, made an avowry, and claimed a return. Now, if the distress, as was the case there, were good only as to part, the plaintiff would be entitled to damages, and the defendant would be entitled to a return of the part for which the distress was good, and to damages consequent upon that return, so that there might be two different judgments properly entered upon the record. Upon this ground it seems to me, that that case is distinguishable from the present, and *Postan v. Stanway* being directly in point, we are not warranted in departing from the authority of that case. Upon the other point, I have no doubt that the master has exercised a sound discretion; and as to the liberty of setting off the costs against each other, that cannot be allowed, because it would destroy the lien of the plaintiff's attorney. The rule must, therefore, be discharged.

BEST, J. I am not disposed to disturb the practice which has prevailed as to the allowance of costs by the master, where two parties appear by the same attorney. *It seems to be a reasonable and proper rule. As to the [**47 second point, I think the case in *Lutwyche* is clearly distinguishable from the present, upon the ground pointed out by my brother *Bayley*. But even if that were not the case, I would adhere to the authority of *Postan v. Stanway* in preference to it. Upon the third point, the cases cited are distinguishable upon this ground, that there the application was made on the part of the plaintiff, and upon an affidavit, in the first case, that the two defendants, who had suffered judgment to go by default, had acted under the authority of the other defendant, who had obtained the verdict, and that the latter had undertaken to pay their damages and costs. Here, however, the application is on the part of the defendant, and, if we were to grant it, we should disturb the lien to which the plaintiff's attorney is entitled. The rule must, therefore, be discharged, and with costs.

Rule discharged with costs.(a)

In the Matter of the Executors of AITKIN, deceased.

Where the employment of an attorney is so connected with his professional character as to afford a presumption that his employment was in consequence of that character, the court will interfere in a summary way to compel him faithfully to execute the trust reposed in him; and therefore, where an attorney was employed by A. to collect and get in the effects due to him as administrator of another person, the court compelled the attorney to render an account to the executors of A. of the moneys, &c., received by him, although he had never been employed by A. or his executors to conduct any suit in law or equity on his or their behalf.

SCARLETT had obtained a rule, calling upon Mr. Blamire, an attorney of this court, to show cause why he should not deliver to the attorneys of the executors *of John Aitkin his bill of costs, in relation to business done for the said John Aitkin, deceased, as administrator of George Aitkin, deceased; and also an account of his receipts and payments in respect of the estate of George Aitkin; and why he should not pay over the balance in his hands, and deliver up all deeds, papers, and writings in his custody or power belonging to the said executors. It appeared from the affidavits that Mr. Blamire had been employed by John Aitkin as his attorney and agent, to collect and get in the effects of George Aitkin, and that he had received considerable sums of money on that account: that repeated applications had been made by the executors of John Aitkin for this account, and for his bill of costs relating thereto; which

(a) Abbott, C. J., and Holroyd, J., were absent in the house of lords.

had all been ineffectual. The affidavits in answer stated, that Mr. Blamire never was employed either by John Aitkin or by his executors in prosecuting or defending any cause or suit, or other proceeding in this court, or in any other court of law or equity.

Littledale showed cause, and contended that this was an answer to the present application ; and he cited *Cocks v. Harman*, 6 East, 404, where an application for a rule upon the defendant, to deliver up to the plaintiff an account similar to the present, was refused. And in *Ex parte Lowe*, 8 East, 237, a similar application was refused.

Scarlett, contrà. If this rule be made absolute, it will be for the advantage of the attorneys themselves, for it will prevent them from having it in their power *49] to do that which is wrong, and the exercise of this summary jurisdiction over them, as officers of the court, will be equally for the advantage of the public ; and he cited *Hughes v. Mayre*, 3 T. R. 275, and *Strong v. Howe*, 1 Stran. 621, where the court compelled an attorney to deliver up deeds entrusted to him by his clients ; and he contended that no distinction could be made between the delivering up of deeds and the payment of the money in dispute.

ABBOTT, C. J. The question in this case is, whether this court will compel an attorney to do that which in justice he ought to do. Now the rule by which the court are to be governed in exercising this summary jurisdiction over its officers seems to be this ; where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the court will exercise this jurisdiction. And the case where the court compelled the attorney to deliver over deeds, placed in his hands for the purpose of making a conveyance, proceeds upon this ground. For inasmuch as a conveyance requires knowledge of law, the trust is reposed by the client in the party, in respect of his being an attorney. I am of opinion that the facts in this case bring it within this rule, and that the rule ought to be made absolute.

Rule absolute.

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*CRAWSHAY and Others v. HOMFRAY and Others.

The wharfage, &c., due upon goods imported, was, by the course of trade, paid by the importer at the Christmas following the importation, whether the goods were in the mean time removed or not. The goods were sold to A., and, after Christmas, the merchant importer became bankrupt : Held, that there was no lien on the goods for the wharfage, &c., as against A.

TROVER for iron. Plea, general issue. At the trial at the last sittings at Guildhall, before **ABBOTT, C. J.**, it appeared that the iron in question had been imported by Messrs. Tottie and Co., and landed at defendants' wharf on the 14th October. On the 15th October the plaintiffs purchased the same of Tottie and Co., and the order for delivery of it was given, and the price paid to Tottie and Co. by the plaintiffs on the following day. A part of the iron was subsequently delivered to the plaintiffs at different times, till March following, when, in consequence of Tottie and Co. having become bankrupts, the remainder of the iron, amounting to about 90 tons, was detained by the defendants, who claimed a lien upon it for their charges in respect of wharfage, &c. These charges amounted to about 12*£l.*, and the course of dealing proved as to them was that they were usually paid by the merchant importer at the Christmas following the importation, whether the iron had been removed in the mean time or not. Upon the trial, the lord chief justice was of opinion that the defend-

ants were not entitled to a lien upon the iron for these charges ; and the jury, under his direction, found a verdict for the plaintiffs. And now

Marryat moved for a rule nisi to set aside this verdict, and to enter a non-suit. If in this case the usual time for payment of the charges upon the iron had not arrived, the case would be very different. Here, however, "it had [**51 expired, and the money was demandable at the time when the lien was claimed, and this brings the case within the authority of *Stevenson v. Blakelock*, 1 M. & S. 535, in which this very distinction was taken, between that case and *Cowell v. Simpson*, 16 Ves. jun. 275. It was, indeed, formerly laid down, in *Bremin v. Currant*, Bull. N. P. 45, that wherever there was a special agreement, there could be no lien ; but that must now be taken subject to the observations made by *Gibbs*, C. J., in *Hutton v. Bragg*, 2 Marsh, 345, where he cites 2 Roll. Ab. 92, M. pl. 2, 6, and Cro. Car. 271, and Yelv. 66 ; and there that learned judge expressly guards against the being understood as saying that the lien which had been taken away by an agreement to pay in bills would not be restored after those bills had been dishonoured. And in *Chase v. Westmore*, Selw. N. P. 1322, this court held, that an agreement to pay a miller in a particular manner did not deprive him of his right of lien. Here, perhaps, in the interval between October and Christmas, the defendant's right of lien was suspended ; but upon the failure of Tottie and Co. to pay at that time, the right of lien was restored.

Abbott, C. J. I think we ought not to grant any rule in this case. It is distinguishable from the authorities which have been cited. Here it is clear that, at the time when this iron was originally purchased by the plaintiffs, these defendants had no lien upon it for these charges. Now can it be contended that after this a lien upon these goods, the property of the plaintiffs, is to arise from a subsequent default in payment by other *persons. I think it can- [**52 not ; and, therefore, retain my opinion at the trial, that the plaintiffs are entitled to recover.

Bayley, J. According to the usage of trade, it appears that in this case a specific time is given to the merchant importer for the payment of these dues. The iron in question, which originally belonged to Tottie and Co., was by them sold to the plaintiffs in October, and at that time the plaintiffs had clearly a right to the delivery, without any lien being claimed by the defendants. In consequence of this, on their application, a great part of it is delivered. How, then, can the non-delivery of the remainder, till after the debt due from Tottie and Co. has become payable, make any difference ? As it is clear that at the time of the sale the defendants had no lien, I am of opinion that the subsequent non-delivery did not give any new right of lien to them.

Holroyd, J. The principle laid down in *Chase v. Westmore*, where all the cases came under the consideration of the court, was this, that a special agreement did not of itself destroy the right to retain ; but that it did so only where it contained some term inconsistent with that right. Now if by such agreement the party is entitled to have the goods immediately, and the payment in respect of them is to take place at a future time, that is inconsistent with the right to retain the goods till payment. That was the case here : the wharfage was not payable till Christmas, and by the sale the plaintiffs had a right to an immediate delivery of the goods. And the subsequent default of Tottie and Co. *to [**53 pay the debt due from them will not alter the case. I think, therefore, that the defendants had in this case no right to retain, and that this verdict is right.

Best, J. The principle has been truly stated, that unless the special agreement be inconsistent with the right of lien, it will not destroy it. Here, however, it seems to me that it was inconsistent, the wharfage not being, by the usage of the trade, payable till a subsequent period, and the goods being to be

delivered immediately. There was, therefore, in this case no original right of lien in respect of these charges ; and I am not aware of any case where it has been decided that a subsequent default in payment can give such a right where it did not originally exist.

Rule refused.

DOE, on the Demise of SUTTON, *v.* RIDGWAY.

In the proof of a pedigree, the dying declarations of A., as to the relationship of the lessor of the plaintiff to the person last seised, are not receivable in evidence.

EJECTMENT to recover lands in the county of Somerset. Plea, general issue. At the trial, before BURROUGH, J., at the last Summer assizes for that county, the lessor of the plaintiff, who claimed, as heir at law of Anne Walker, the person last seised, in order to deduce the pedigree, offered in evidence the dying declarations of one Barrett, who had as she herself stated, been servant to Margaret Walker, through whom the pedigree was traced. This person had, during her last illness, at the age of 103, after she had expressed her full conviction [54] that she could not recover, and only a few days before her death, made these declarations. The learned judge rejected the evidence ; and the defendant having obtained a verdict,

Scarlett moved for a new trial. These declarations ought to have been received in evidence. The principle on which such evidence is receivable is stated to be founded partly on the situation of the dying person, which is considered as powerful over his conscience as the obligation of an oath, and partly on the absence of interest at such a time, which dispenses with the necessity of a cross examination, Phillipps on Evidence, 100, 1st edit. ; and this equally applies to civil as to criminal cases. This will be found laid down in the case of the subscribing witness to a bond, whose dying declarations were allowed to be given in evidence, by HEATH, J., cited by Lord ELLENBOROUGH in *Avison v. Kinnaird*, 6 East, 195, to prove it a forgery, and in *Wright, dem. Clymer, v. Littler*, 3 Burr. 1244. And in *Drummond's* case, 1 Leach, Cro. Cas. 378, it seems to have been admitted, that the dying declaration of a person, as to his having stolen a watch, would be admissible, although there the evidence was rejected, on the ground that the party making the declarations was an attainted convict. Here the party was in articulo mortis, and could have no motive for deceit. The declarations ought, therefore, to have been received. He also referred to *Tinkler's* case, 1 East, Pl. Cr. 354.

ABBOTT, C. J. The cases cited are, I believe, the only exceptions to the general rule of not receiving evidence, *unless upon oath, and with the opportunity for cross examination. I am not aware of any other ; and it seems to me, that the present case does not fall within these exceptions. The evidence, therefore, was properly rejected by the learned judge.

BAYLEY, J. In the case of *Avison v. Kinnaird*, the declarations were received upon a very different principle. There they were part of the res gestae ; and, in *Tinkler's* case, the declarations received were those of the party who had taken the poison. The case of the subscribing witness seems to be founded on this ; he must have been called as a witness, if he had been alive, and it would then have been competent to prove, by cross examination, his declarations as to the forgery of the bond. Now the party ought not, by the death of the witness, to be deprived of obtaining the advantage of such evidence. This case, however, is very different.

HOLROYD and BEST, Js., concurred.

A rule nisi was afterwards granted on other grounds.

The KING v. INMAN.

An apprentice, bound for seven years to A., served him in his house between five and six years, and afterwards, for the remainder of the term, resided in his mother's house, having agreed with his master that he should be at liberty to work for whom he pleased, he paying 2s. per week to his master. The master also, during this time, occasionally gave him work, for which he was not paid : *Held*, that this was not a continuance of the service to A. for seven years under the indenture.

Quo warranto against the defendant, for exercising the franchise of a free burgess of the borough of Colchester, in the county of Essex. The custom stated in the defendant's plea was, that every person who has "served an apprenticeship by indenture, to a free burgess of the said borough, for the [**56 term of seven years, according to the custom of the said borough, in any art, trade, mystery, or manual occupation, hath used and of right hath been, and of right ought to be admitted and sworn into the office of a free burgess of the said borough ; and the plea further stated, that the defendant had served an apprenticeship, for seven years, according to this custom, to one George Johnstone, in the art, trade, and mystery of a cordwainer. At the trial, before Wood, B., at the last assizes for the county of Essex, it appeared, that the defendant had been bound apprentice for seven years, to Johnstone, a freeman of Colchester. He served him between five and six years, under the indenture, during which time he lived in his master's house. At the expiration of this time, his master's business having diminished, he quitted his house, and went away to reside in that of his mother ; during which time, his master permitted him to work for any other persons whom he might choose, he having agreed to pay to his master two shillings a week. His master occasionally gave him work to do, for which he was not paid, and, during all this time, the indenture remained in the master's possession. The jury having found a verdict for the crown,

Lawes, Serjt., moved for a rule nisi, to set it aside. In this case, the apprentice paid 2s. a week, during the whole period when he was absent, and that makes it, in point of law, continue to be a service to the first master, under the indenture, *Rex v. Offerton*, Burr. S. C. 802 ; and here, also, the indentures were never given up.

***ABBOTT**, C. J. It is quite clear, that in order to entitle this party to [**57 his freedom, there must be not only a continuance of the binding, but also a continuance of the service under the indentures, to a free burgess, during the whole period of seven years. I am of opinion, that the service under the indentures, to the first master, did not continue so long ; and the consequence is, that the party is not entitled to his freedom. The verdict, therefore, was right.

Rule refused:

DOE, on the Demise of SIMON WESTLAKE, v. SIMON WESTLAKE.

A testator, by his will, devised to Matthew W., his brother, and Simon W., his brother's son, a certain estate. It appeared that the testator had three brothers, each of whom had a son of the name of Simon, living at the time of the testator's death : *Held*, that the proof of this fact did not raise any latent ambiguity in the will, so as to let in parol evidence of declarations of the testator, as to the person intended ; it being clear, that the person entitled was Simon, son of Matthew.

EJECTMENT for a moiety of certain premises in the county of Devon. Plea, not guilty. At the trial before **GRAHAM**, B. at the last assizes for the county of Devon, the plaintiff claimed under the will of his uncle Simon Westlake, of Exbourne, in the county of Devon, by which, among other things, he bequeathed unto his brother, Thomas Westlake, 20*l.* ; to Elizabeth Luxton, his brother Richard's daughter, 10*l.* and the use of a house during her life ; and he then gave and bequeathed unto Mary, the wife of Matthew Westlake, his brother, the yearly sum of 5*l.* to be paid her by her husband out of his moiety of the tenement called Stone: then followed the devise upon which the question turned.

I give, devise, and bequeath unto Matthew Westlake, my brother, and to Simon Westlake, my brother's son, all that my fee-simple messuage or tenement called Stone, situate in Exbourne, in the county of Devon, which said *58] premises I give and devise to each of them, jointly and severally alike, and to each of their heirs and assigns for ever, subject to the payment of the annuity to my wife, before mentioned, as well as to the payment of the legacies given by the will; and I charge my real estate with the payment of such legacies. I likewise give and bequeath unto Matthew Westlake, my brother, and to Simon Westlake, jointly and severally alike, all other my messuages, tenements, lands, goods, and chattels, and testamentary estates whatsoever, and I appoint them executors of my will." It appeared in evidence that the testator had three brothers, Thomas, Richard, and Matthew, each of whom had a son of the name of Simon, living at the time of the testator's death. The defendant's counsel contended that that established a latent ambiguity in the will, and they tendered evidence of declarations of the testator to show that he had intended to bequeath his property to the defendant, Simon Westlake, who was the son of Richard Westlake. The learned judge received the evidence. The jury, however, found a verdict for the plaintiff. And now

Moore moved for a new trial, on the ground that this verdict was against the evidence; but

ABBOTT, C. J. It is unnecessary to consider whether this verdict was against the evidence; for I am very clearly of opinion that the declarations of the testator ought not to have been received in evidence at all. It is perfectly true, that a latent ambiguity may be raised by the proof of some fact not to be collected from the will itself; but then the fact must be such as, when proved, will raise an ambiguity in the will. Now the fact of the three brothers of the testator *59] having each a son of the name of Simon does not raise any ambiguity upon this will. The devise upon which the question turns forms a distinct independent sentence, and is in these words: "I give, devise, and bequeath unto Matthew Westlake, my brother, and unto Simon Westlake, my brother's son." Now it seems to me that, in point of legal construction, when the testator is speaking of his brother's son, he must be taken to speak of the son of that brother who was then particularly in his mind. Matthew Westlake was the brother then in the mind of the testator; and, consequently, Simon Westlake, his son, must be the person intended. Admitting it, therefore, to be the fact that the testator had three brothers, each of whom had a son of the name of Simon, I cannot entertain the least doubt that he intended by this devise to give the property to Simon the son of Matthew Westlake. If that be so, there was no ambiguity in the will; and, therefore, the evidence ought not to have been received. I am, therefore, of opinion that there is no ground for a new trial.

Rule refused.

AUBIN v. DALY.

By letters patent, 24 Car. 2, the king granted to the use of A., his heirs and assigns for ever, an annuity of 1000*l.*, to be paid out of his revenue of four and a half per cent. at Barbadoes and the Leeward islands: Held, that this annuity was personal property, and duly passed under a will attested by two witnesses, by a residuary clause bequeathing all the rest, residue, and remainder of a testatrix's personal estate, of what nature or kind soever, to her executors.

By letters patent, under the great seal of England, dated July 19, 24 Car. 2, as well in consideration of the surrender by the Earl of Kinnoul, into the hands *60] of "the crown, of the Caribbee islands, and certain other islands, and possession therein referred to, and all his estate, claim, and demand in or to the same, as also for divers other good causes and considerations, his majesty did, for himself, his heirs and successors, give and grant unto the said earl one

annuity of 600*l.* of lawful money of England, to hold, enjoy, and receive the same, to him the said earl, his executors, administrators, and assigns, for the term of five years, from the feast of Saint Michael the Archangel, then last past. And the king also granted unto the Earl of Kinnoul and his heirs, one other annuity of 1000*l.* of lawful money of England, to him the said earl, his heirs and assigns; to the only proper use and behoof of the said earl, his heirs and assigns for ever, from and immediately after the end and expiration of the said term of five years, without any account or other matter or thing to be rendered or given for the same; which said respective annuities the king appointed should from time to time be duly paid to the earl, his heirs, executors, administrators, and assigns, at the four most usual feasts and terms in the year, out of his majesty's revenue of 4*½* per cent., at Barbadoes and the Leeward islands, as the same should come into the receipt of his majesty's exchequer, or by levying tallies of assessments upon the farmers or collectors of the said revenue for the time being, notwithstanding any debt or debts charged or chargeable upon the said revenue, or any part thereof, the first payment to commence from the feast day of Saint Michael the Archangel; and if it should happen that the said revenue of 4*½* per cent. should at any time or times after the expiration of five years fall short of the said annuities, then the king *granted that the same should be fully made up to the said earl, his executors, administrators, and assigns, out of any other treasure of his ma- [61]jesty, his heirs and successors, at any time being or remaining in the receipt of his exchequer; and his said majesty did thereby authorize the commissioners of his treasury, &c., to give warrant for the levying tallies of assessment from time to time upon the farmers or collectors of the said revenue of 4*½* per cent. at Barbadoes and Leeward islands aforesaid, for the time being, for the due payment of the said annuity of 1000*l.* to the said earl, his heirs, executors, administrators, and assigns respectively as aforesaid; and did declare, that the receipt of the said earl, his heirs, executors, administrators, and assigns respectively, unto the said farmers and collectors, should be sufficient discharge. By virtue of various subsequent conveyances and assurances, and, ultimately, by virtue of a certain indenture, bearing date the 26th day of May, 1773, the annuity of 1000*l.* was granted, bargained, and sold unto William Stafford, to hold the same unto and to the use of him, his heirs, executors, administrators, and assigns respectively, for ever, subject, nevertheless, to a proviso in the said indenture contained, whereby it was declared, that if the grantors, or such persons who for the time being should be entitled to the freehold or inheritance, or other beneficial interest of and in the same annuity, or any part thereof, or any or either of them, should pay or cause to be paid unto the said William Stafford, his heirs, executors, administrators, and assigns, the principal sum of 12,381*l.* 14*s.* 10*d.*, with interest, at the rate of 4*½* per cent., at certain times in the same indenture mentioned, and long since past, he the said William Stafford, his heirs or assigns, would, at their *request and at their charges, regrant the said [62]annuity, and all arrears thereof, unto and to their use, or unto such person or persons as they should appoint in that behalf, freed and discharged from all mesne incumbrances. The said principal money was not paid to Mr. Stafford in his lifetime, and still remains due upon the said mortgage. The exchequer annuity, subject to the usual deductions, was regularly received, up to January 5th, 1818. William Stafford, by his will duly attested, bearing date 22d October, 1777, gave all his real and personal estate whatsoever unto his wife, Alethea Maria Stafford, her heirs, executors, administrators, and assigns, and appointed her sole executrix thereof, and died in the year 1796, without issue. The said will was duly proved by his executrix on the 7th September, 1796. Alethea Maria Stafford, by her will, bearing date the 12th March, 1810, and attested by two witness after directing that all her just debts, funeral and testamentary expenses, and the charges of proving her said will, should be in

the first place paid ; and after giving sundry pecuniary and specific legacies, and divers annuities to several persons, and several charitable institutions therein mentioned, bequeathed as follows ; viz. "And all the rest, residue, and remainder of my personal estate, of what nature or kind soever, I give and bequeath the same, and every part thereof, unto John Aubin and Patrick Lewis, their executors, administrators, and assigns, upon trust, as soon as conveniently may be after my decease, to get in and convert into money all such parts of my estate as shall not consist of money, or of perpetual stocks or funds." And then, out of such moneys, &c., to pay the several pecuniary legacies, and to provide sufficient funds for the payment of the several annuities and other *yearly payments, directed by her will to be made, and to set apart the annual sum of 200*l.*, to be paid for ever to the treasurer for the time being of the Thatched House Society, for the sole uses of that institution. And after directing similar appropriations for the benefit of other charities, she bequeathed all the residue of her said personal estate and effects to be divided equally between and for the benefit of three charities therein named, to be paid in equal proportions, for the benefit of the same respectively. And she appointed the said John Aubin and Patrick Lewis her executors. The testatrix died on the 29th September, 1810, and the said John Aubin and Patrick Lewis duly proved the said will. The exchequer annuity, under an order of the court of chancery, made 17th February, 1817, in a cause of *Aubin v. Daly*, was sold to John Dearman Church, Esq., for the sum of 12,050*l.* The question for the opinion of this court was, whether the legal estate and interest in the said exchequer annuity of 1000*l.* passed, by the will of Alethea Maria Stafford, to John Aubin and Patrick Lewis, the executors named in the will.

Denman, for the plaintiff. The question in this case is, whether this annuity duly passed by a will attested only by two witnesses. That depends on another question, whether this be personal or real property. In Co. Litt. 20 a, it is thus laid down : "And so it is if I, by my deed, for me and my heirs, grant an annuity to a man and the heirs of his body ; for that this *only chargeth my person*, and concerneth no land, nor savoureth of the realtie." *Holderness v. Carmarthen*, 1 Bro. Ch. Ca. 377 ; **Buckeridge v. Ingram*, 2 Ves. jun. 652 ; and *Earl of Stafford v. Buckley*, 2 Ves. 170, are authorities to the same effect ; and in the last case, which is upon the very will now in dispute, Lord HARDWICKE decided this point on the authority cited from Co. Litt.

Richmond, contrà. It is not necessary here to deny the principles of law laid down by the other side. For, admitting that this will is sufficiently executed, still there is an ulterior question, viz. Whether this annuity passes by the will. It must pass by one of two modes. Either it vests in the executors *virtute officii*, or by the residuary bequest to them. An annuity of this sort is thus defined by Lord COKE, Co. Litt. 2, a : "And so it is if an annuitie be granted to a man and his heirs, it is a fee-simple personal." As such it will be descendible to his heirs. It was formerly doubted whether an annuity was assignable ; but that doubt did not extend to annuities of inheritance. *Gerard v. Boden*, Hetley, 80 ; *Baker v. Broke*, Moore, 5. And in Brooke's Abr. tit. *Annuitie*, pl. 39, it is thus laid down : "It was doubted if he who has an annuitie in fee may grant it over, for it is a chose in action ; yet per alios it is an inheritance ; and, therefore, it may well be granted over, and that without attorney, for it charges the person ; and yet the defendant was charged as parson of a church. And a debt cannot descend to the heir, but an annuity of inheritance may descend to the heir ; therefore it is not merely personality." And in Fitzh. Ab. tit. *Release*, pl. 48, "Release of all actions personal is a good bar in a writ of annuity, notwithstanding *he claim to him and his heirs ;" and a release of actions real is also good, because it is mixt." And in *Holderness v. Carmarthen*, 1 Bro. Ch. Ca. 376, an annuity granted by the letters

patent of King William and Queen Mary was considered on the same footing as an annuity of inheritance, and assignable. And the point was also discussed in *Priddy v. Rose*, 3 Meriv. 86. In *Nevil's* case, 7 Rep. 124 b, an annuity of inheritance was held forfeitable for treason by 26 H. 8, c. 13. And in *The Earl of Stafford v. Buckley*, Lord HARDWICK expresssly says of this annuity, "All the rest of the personal estate that could pass to executors would go to them; but this is a kind of personality which, according to Doctor and Student, would not be assets in executors, and, consequently will not go to them by being named executors." These authoritites, therefore, shew that the executors did not take this annuity *virtute officii*. Then are the words in the bequest sufficient to give it to them? The testatrix bequeaths all the rest, residue, and remainder of her personal estate, of what nature or kind soever, and every part thereof, unto J. A. and P. L., their executors, administrators, and assigns, upon certain trusts. Now, it is clear, by reference to Lord HARDWICK's judgment, that he entertained considerable doubts whether this annuity would pass by a sweeping bequest of this nature. Suppose a will bequeathed all the testator's hereditaments to A., and all his personal estate to B. It seems clear that A. would take such an annuity as this, and the heir at law is not to be disinherited without express words, and that though general words are used. *Doe, den. Spearing, v. Buckner*, 12 Mod. 593. [BAYLEY, J. There "the devise was followed by words shewing that the testator had only his personal estate in contemplation. The words of the trust in that case were very material, for the trustees were to add the interest to the principal, which shewed that there the testator was only speaking of his personal estate.] Where the residuary clause is in favour of executors, it was held, *Shaw v. Bull*, 6 T. R. 610, that no more would pass by it than would go to executors *virtute officii*; and that is the case here. And the words "of what nature or kind soever" apply only to real and personal chattels, and do not extend to hereditaments. So, in *Rose v. Bartlett*, Cro. Car. 292, a devise of all lands and tenements was held not to include terms for years. The court, therefore, are not bound by the literal sense of general words. He also cited *Ex parte Sergison*, 4 Ves. 147; *Ex parte Morgan*, 10 Ves. 103; and *Silberschildt v. Schott*, 3 Ves. & B. 45. [BAYLEY, J. The argument would go the length of saying that property of this description could only pass by a special devise.]

Denman, in reply, contended, that it was clear that this annuity passed by the residuary clause in Mrs. Stafford's will. Here there is nothing to restrain the general words of the devise. And the only question is, whether this is personal estate; whether it would pass to the executors *virtute officii* is a very different question from the present. This is the case of a specific bequest of the residue, and is quite sufficient to pass the annuity in question.

Cur. adv. vult.

*The following certificate was afterwards sent:

This case has been argued before us by counsel, and we are of opinion, [**67] that the legal estate and interest in the exchequer annuity of 1000*l.* passed by the will of Alethea Maria Stafford to John Aubin and Patrick Lewis, deceased.

C. ABBOTT.
J. BAYLEY.
G. S. HOLROYD.
W. D. BEST.

Ex parte DOUTHAT.

Where A. having drawn a bill of exchange for 148*l.* in favour of B., to whom he was previously indebted in that amount, committed an act of bankruptcy before either the bill was due or had been presented for acceptance: Held, that such bill of exchange was a good petitioning creditors' debt, although it appeared that subsequently to the commission, the bill had been duly presented and paid by the acceptors.

THE following case was sent by the lord chancellor for the opinion of this court.

On the 30th March, 1819, Stephens Douthat, late of Liverpool, merchant, absconded from Liverpool, being very considerably indebted to creditors who had trusted him in the ways of his trade ; and on the 8th April, 1819, a commission of bankrupt under the great seal of Great Britain, bearing date that day, was awarded and issued against the said Stephens Douthat on the petition of William Wade, of Liverpool, aforesaid, merchant, the holder of a bill of exchange, dated the 7th March, 1819, drawn by the said Stephens Douthat on Eyes and Miller, and accepted by them, for 148*l.* 7*s.* 2*d.* payable to the order of the said William Wade four months after date, which bill of exchange was given by the said Stephens Douthat in payment of the sum of 148*l.* 7*s.* 2*d.* due from the said Stephens Douthat to the said William Wade, being the balance *68] of an account current adjusted between them, *and which debt, or such balance of account, was due in cash before the bill was drawn. Before the bill became due the said William Wade proved the said bill as a debt under the said commission. The said Eyes and Miller are merchants in Liverpool aforesaid, and were in good credit at the time of the issuing of the said commission, and the said bill of exchange, when at maturity, was duly paid by them.

The question for the opinion of this court was, whether, under the circumstances aforesaid, there was, at the date and suing forth of the said commission, a good petitioning creditor's debt to support the same.

Littledale, in support of the petitioning creditor's debt. This question depends on the construction of two statutes, 7 G. 1, c. 31, and 5 G. 2, c. 30, s. 22. By the first section of the former act persons having bills, &c., given by bankrupts but payable at a future day, are admitted to prove them under the commission in like manner as if they were made payable presently ; but by the third section such persons are prohibited from being petitioning creditors. By the second act, however, this latter provision is repealed, and the question, therefore, is, whether this would fall within the first section of 7 G. 1, c. 31, and be a debt proveable under the commission. Now, as to that, there are several cases in point ; in *McCarty v. Barrow*, Str. 949, 3 Wils. 16, and 7 East, 437, S. C., the defendant drew bills on Spain, and afterward became bankrupt, and subsequently to this the bills were returned unaccepted, and protested ; and the court discharged him out of custody on the ground, that it was *69] a debt proveable under the commission. *And Lord C. J. WILMOT said, in observing on this case in the case of *Chilton v. Whiffin*, 3 Wilson, 17, that the statute 7 G. 1, c. 31, extended to the case, and *Starey v. Barns*, 7 East, 437, is to the same effect. In *Brett v. Levett*, 13 East, 213, the court held, that bills of exchange, to the amount of 100*l.* drawn before the act of bankruptcy, but due afterwards, were sufficient, when due, to found a petition for a commission. It is true, that in these cases the bills had been dishonoured ; but that can make no difference in the judgment, for the dishonour had not taken place at the time of the act of bankruptcy, and the subsequent dishonour would not therefore vary the case ; for it must have been a debt due at the time of the act of bankruptcy, and that it could only be by force of the statutes, *Ex parte Charles*, 14 East, 197 : nor can the subsequent payment of the bill alter the situation of the parties ; for if that were to be the law, the commissioners, and all persons acting under their authority, would become trespassers ab initio by an ex post facto payment by a third person, although, at the time when they acted, it could not be ascertained whether such payment would ever be made. This would be in effect to repeal the act which enables holders of such securities to become petitioning creditors ; for no person would ever venture to act upon it. In this case, too, there is an additional circumstance that the bill of exchange, was given for an antecedent debt, which relieves the case from some of the difficulties suggested in the other cases. The case relied on by the other

side, of *Rose v. Rowcroft*, 4 Campb. 245, can hardly be considered as an authority; all that appears there, is, that *GIBBS, C. J., did not like to decide the point; inasmuch as it was not necessary so to do, it can hardly be [**70] considered as showing that he entertained any serious doubts upon the question.

Parke, contra. The words of the 7 G. 1, c. 31, s. 1, are very material, it states that all and every person or persons who have given credit or shall hereafter give credit on such securities, &c., shall be admitted to prove them as if payable presently, and not at a future day. What, therefore, is done is simply this; where the bankrupt is liable, the statute accelerates the time of payment; but it does not alter, in any respect, the law, as to his liability. Now, the drawer of a bill of exchange is not liable until after the bill has been presented and default made by the acceptor, and that default duly communicated to the drawer. When these formalities have been complied with, and the bill has been dishonoured, then, undoubtedly, the credit is given on the security to the bankrupt, and the statute applies. The construction contended for by the other side, would lead to this consequence that a commission of bankruptcy might be sued out against a perfectly solvent person, and that by a petitioning creditor, who had received no injury whatever. [ABBOtt, C. J. That cannot be, unless the party has, by committing an act of bankruptcy, subjected himself to this inconvenience. That, at least, is an act dependent on himself.] In the present case, it appears that the petitioning creditor has sustained no damage, for the acceptors duly paid the bill when presented to them. All the statutes of bankruptcy speak of the petitioning creditor as a party injured. The 35 Hen. 8, c. 9, speaking of the petition, describes it as "a complaint in writing by any parties grieved concerning *the premises." The 13 Eliz. c. 7, and 1 Jac. 1, c. 15, are to the same effect. And in *Ex parte Deodney and Seaman*, 15 Ves. 496, Lord ELDON, in discussing this question, says that this species of execution, (viz. by a commission of bankrupt), was intended by the legislature to be given to those creditors, who, if a commission had not issued, could, by legal or equitable remedies, have compelled payment. Now, that seems to be the test to be applied here. Until the bill has been dishonoured, the holder cannot compel payment against the drawer. In all the cases cited on the other side, the bill has been dishonoured before the proof under the commission. [BAYLEY, J. The dishonour was subsequent to the issuing the commission, and a party can only prove for debts then due. The cases, therefore, show, that proof has been allowed in cases where the bills had not been dishonoured. ABBOtt, C. J. The word "debt" is not to be found in the 7 G. 1, c. 31. The party is to be allowed to prove his bill-bond note or other security. And no distinction can now be taken, between a proveable debt, and that of the petitioning creditor. BAYLEY, J. The words of the statute are, "all persons who shall give credit," &c. Now a man who takes a bill from the drawer is surely a person giving credit to him; and the provision as to the rebate of interest, is also strong to show that the legislature contemplated a possible proof under the commission, and a payment of a dividend, too, before the bill should become due.] As to the rebate of interest, spoken of in the statute, these words will be satisfied by applying them to cases where the bankrupt is acceptor of a bill, between whose situation and that of the drawer there is a material difference.

Littledale*, in reply. The words, as to the rebate of interest, are perfectly general, and there is nothing whatever to show that they are to be [72] restrained to the case of the bankrupt being the acceptor of a bill. And the judgment of Lord ELLENBOROUGH, in *Starey v. Barns*, where he dissects the statute 7 G. 1, c. 31, is decisive of the present case.

The following certificate was afterwards sent:

This case has been argued before us, by counsel, and we are of opinion that

there was, at the date and suing forth of the said commission aforesaid, a good petitioning creditor's debt to support the same.

C. ABBOTT.
J. BAYLEY.
G. S. HOLROYD
W. D. BEST.

HAMMOND v. REID.

Policy of insurance from Para to New York, with leave to call at any of the Windward and Leeward islands on the passage, and to discharge, exchange, and take on board the whole or any part of any cargo at any ports or places, particularly at all or any of the Windward and Leeward islands, without being deemed any deviation: *Held*, on this policy, the ship having proceeded to two of the Leeward islands for a purpose wholly unconnected with the voyage, that it was a deviation, and vitiated the insurance.

ACTION on a policy of insurance on the ship Arabella, on a voyage at and from Para to New York, during her stay there, and at and from thence to Para, *with leave to call at all or any of the Windward and Leeward islands and colonies on her passage to New York*, with leave to discharge, exchange, and take on board the whole or any part of any cargo or cargoes at any ports or *73] places she might call at or proceed to, particularly *at all or any of the Windward and Leeward islands, without being deemed any deviation from and without prejudice to the insurance. The declaration stated the sailing of the vessel on the voyage insured, and a loss by perils of the seas. Plea general issue. At the trial, at the Lancaster Summer assizes, 1819, before BAYLEY, J., a verdict was found for the plaintiff, subject to the opinion of the court on a case, which stated, that the ship sailed from Para on the voyage insured with a cargo on board, bound for New York; but with orders from the plaintiff, her owner, to proceed in the first instance to Barbadoes, where the captain was directed to sell the cargo and receive other goods on board in exchange for it, and proceed from thence to New York, after calling at the islands of St. Bartholomew and St. Thomas, two of the Leeward islands, for the purposes after stated. When the vessel sailed from Para the plaintiff was there, and intended to proceed from thence in another vessel direct to New York, where he expected to meet a vessel, also belonging to himself, called, the Alice, from Liverpool, which last-mentioned vessel he then proposed to load at New York with goods for the said islands of St. Bartholomew and St. Thomas, and directed the captain of the Arabella, after finishing his trading at Barbadoes, to proceed to St. Bartholomew and St. Thomas, for the purpose of obtaining information in regard to the state of the market, and on other subjects at those islands, with the view of forming his opinion upon the speculation he proposed to enter into by the said ship Alice from New York to those islands. The Arabella arrived at Barbadoes on the 5th March, 1817, where she discharged her cargo, and received on board a quantity of sugar, with which she sailed for *74] "New York on the 4th of April following, intending to call at St. Bartholomew's and St. Thomas's, two of the Leeward islands, in her way to New York. In the course of this voyage, after having passed the islands of St. Bartholomew and St. Thomas, she was lost off Savannah. When the ship sailed from Barbadoes, on the 4th of April, her objects of trade were at an end, until she should arrive at New York, and she proceeded to the islands of St. Bartholomew and St. Thomas only to obtain information for the purpose before stated.

Littledale, for the plaintiff, contended, that the going to the islands of St. Bartholomew and St. Thomas was no deviation. Here is an express leave given to touch at all or any of the Windward or Leeward islands. Under that liberty the vessel had a right to go to the islands in question. And, besides,

the intelligence obtained there might probably have some effect on her ultimate destination.

F. Pollock, contra, after citing *Rucker v. Allnutt*, 15 East, 278, and *Langhorn v. Allnutt*, 4 Taunt. 519, was stopped by the court.

ABBOTT, C. J. This calling at the islands of St. Bartholomew and St. Thomas was for a purpose wholly unconnected with the voyage in question. If, as it was said, the intelligence to be obtained there would be likely to have altered the destination of the ship, the question would be different. But the contrary is expressly stated in the case; for it is stated that it had reference to some new adventure to be subsequently *undertaken in another vessel. [75] I think, therefore, that this being a calling for a purpose entirely unconnected with the voyage was, notwithstanding the words in the policy, a deviation, and that the plaintiff is not entitled to recover.

Per Curiam,

Judgment for the defendant.

The KING v. The Inhabitants of the Township of HATFIELD.

Where in an indictment against a township for non-repair of a road, the prescription stated and proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which, but for such usage, would be repairable by the parish at large: *Held*, that this places the township in the situation of a parish, and that it is necessary for the defendants to show by evidence some other persons in certainty who are liable, in order to deliver themselves from their liability to repair.

INDICTMENT against the defendants for non-repair of a highway. The first count alleged a prescription, that the defendants, from time immemorial, had repaired and been accustomed to repair, and of right ought to have repaired, and still of right ought to repair, as often as it should be necessary, such and so many of the common king's highways, situate within their township, as would otherwise, and but for such usage or prescription, be repairable by the inhabitants of the parish of Hatfield at large. The second count varied only in stating the prescription to be for the several and respective townships, &c., within the parish of Hatfield, to repair separately from each other the several roads situate within each township, &c., respectively. Plea, general issue. At the trial at the last York assizes, before *BAYLEY*, J., a verdict for the crown was found by the jury, subject to the opinion of this court on a case, which stated, that the road, a part of which formed the subject of this indictment, was one *leading from Doncaster to Epworth, and other places in the county of Lincoln. Its course lay along a bank commonly called the Low Level Bank, elevated one or two feet above the adjacent country. It was bounded on one side by a large open drain, and on the other by fence ditches. This bank was made by the earth of the drain. By articles of agreement, dated 24th May, in the second year of the reign of Charles the First, between that king and Cornelius Vermuyden, Esq., which recited that the king was seised in fee of Hatfield Chase and Ditch Marsh, and of divers manors and lands adjoining, and that certain lands, wastes, commons, and waste grounds, situate, lying, and being upon each side of the river Idle, and abutting on the rivers Dun and Ayre to the north, and the river Trent towards the south, being parcel of the said premises, and containing by estimation 60,000 acres or thereabouts, were subject to be surrounded and drowned with water in such manner that little or no benefit could be made thereof, unless special care were taken for innning and draining the same. The said articles contained an agreement on the part of Cornelius Vermuyden to drain these lands, in consideration of himself or his nominees having the fee simple of one third part of the lands when drained. In this agreement were the following clauses: "And it is further agreed, and his majesty doth hereby declare, that the said Cornelius Vermuyden, and others the parties aforesaid, shall

[76]

and may, at their wills and pleasures, and as to him or them shall be thought most necessary and expedient, cut, dig, and make or cause to be made, such and so many channels, watercourses, banks, highways, sosses, sluices, and other receptacles for water, and shall have for himself and his servants and workmen,

*77] the perfecting and performance of the said works, and draining the lands and grounds aforesaid, without the let, denial, hindrance, or interruption of any person or persons whatsoever, and shall also have and take such quantity and proportion of earth, reed, and other things and materials within the said grounds for perfecting the said work as by him or them shall be thought necessary and useful, and shall also have for his and their use and uses, freely, without interruption, the benefit of all and singular channels, watercourses, and sluices, which are now already made or digged within the said lands or grounds, and the same to turn, change, or alter for the more necessary draining of the said grounds, and perfecting the said works, or as he or they shall think fit; and it is hereby further concluded and agreed, that if the said Cornelius Vermuyden, and other the parties and undertakers by him to be employed as aforesaid, shall have cause at any time or times to use any of the lands and grounds lying or being without the compass of the grounds hereby intended to be drained and laid dry as aforesaid, and not subject to surrounding for any passage of water or otherwise, then it shall and may be lawful to and for the said Cornelius Vermuyden, and other the parties aforesaid, to use the same, so far as shall be necessary, in and for the performance of the said works. The drainage having been partly executed in the 11th year of the reign of Charles the first, 12,459 acres, being one third part of the lands then drained, were, in pursuance of the above agreement, conveyed in fee to Sir Wm. Curteine and others, the nominees of Cornelius Ver-

*78] muiden. The participants of the Level *of Hatfield Chase were the persons who were the owners of the lands subsequently conveyed, under the above articles, to Cornelius Vermuyden or his nominees. The road in question, which ran through these lands, had been, as far back as living memory went, repaired by the participants out of their general scots. These repairs were made by sand which was brought from a distance, and by throwing soil from the adjacent drains, when cleansed out by the participants, for the purposes of the drainage, sand being the usual material for the repairs of that road. The participants were not a corporation, nor was it ascertained at the trial who all the different individuals, composing that body, were, though the names of some were proved. No repairs were proved to have been done by the defendants upon the particular road indicted; but their prescriptive liability, as stated in the indictment, was proved. The question for the opinion of the court was, whether the inhabitants of the township of Hatfield were liable to repair this road; and the court were to be at liberty to make any presumption which they should think the jury ought to have made.

E. Alderson, for the crown. The prescription is, in this case, that the defendants are bound to repair all the roads within their township, which would ordinarily be repaired by the parish. They are therefore, to be considered in the same point of view as the inhabitants of a parish, *Rex v. Netherthong*, 2 B. & A. 179. Now, if so, they must throw the liability on some other persons, or they will be liable themselves. Here the participants

*79] are the *only persons who can be contended to be liable; and their liability can only arise in one of two ways, either by reason of tenure or by reason of inclosure. Both these are put an end to by the facts in the case. The road is described as on a bank, formed by the earth out of the adjacent drain. It had its origin, therefore, subsequently to the drain. Now, the drainage was in the 2 Car. 1; and, therefore, the road is not immemorial. And, to make the parties liable ratione tenure, it must be

an immemorial road. *Rex v. Stoughton*, 2 Saund. 168 d. n. 9. Nor can the participants be liable to repair ratione clausuræ, because it also appears that the drain which caused the clausura was anterior to the road. The rights of the public have, therefore, never been abridged by the inclosure, which is the foundation for this species of liability. Then, if so, the participants are not liable; and the consequence will be, that the defendants are so. As to the repairs, they are very trifling; and, admitting that they raise a presumption that the participants are liable, that presumption is rebutted by the other facts in the case.

Parke, contrâ. It is quite clear that this is a public highway, which, so far back as living memory can go, has been repaired by the participants, and never by the defendants. Every presumption ought, therefore, to be made, in favour of such long and uninterrupted usage. It does not, by any means, appear clear, that this was not an immemorial highway; for though it might be posterior to the formation of the drain, still there is nothing to show, that the drain itself was not an *immemorial drain. The agreement with Vermuyden, set out in the case, speaks of drains and passages for water, as already existing before the drainage by him. [ABBOTT, C. J. Even supposing that to be so, still the question recurs, by whom was that road previously repairable? If by the crown, all the waste lands would then have been liable to the burthen; and it is not shown who is in possession of them.] Although all the lands might be liable to contribute, yet an indictment might be sustained against the participants, who are in possession of a part. *Regina v. Duchess of Buccleugh*, 1 Salk. 358, and 3 Vin. Abr. tit. *Apportionment*, 5 pl. 9. And if not, it would still be an answer to the present indictment, which is against a township, and not a parish. It is therefore sufficient to show, that some others are liable, without fixing on the individuals, or showing, in certain, what lands are chargeable with the burthen; for such evidence negatives the special liability imposed by custom, contrary to the common law, on the township. *Rex v. Stoughton*, 159 a, n. 10. [HOLROYD, J. There is a difference between cases, where the indictment charges a special prescription to repair a particular road, and a general prescription to repair all roads, within the township, as here. In the former case, the rule is, as it is stated; but, in the latter, the defendant must show, by evidence, some certain persons bound to the repair. I remember this distinction to have been taken, in a case tried before Mr. J. CHAMBRE.] Here, too, a presumption may be made, that the individual third part, assigned to the participants, was the part immemorially bound. Secondly, these lands might have been granted by the *crown, subject to this burden, and that will be sufficient. [ABBOTT, C. J. Here the grant is stated in the case; and no such condition is to be found in it, which negatives such a presumption.] But even if the court think that there is not sufficient ground to presume a liability, ratione tenure, still these participants may be liable, ratione clausuræ; for there is nothing to show, that the fence-ditches, which bound the road on one side, were not posterior to the road. And if an owner incloses land on one side, which has been anciently inclosed on the other, he ought to repair all the way. *Rex v. Stoughton*, 161, n. 12.

E. Alderson, in reply, was stopped by the court.

ABBOTT, C. J. The prescription stated in this indictment, and which has been proved in evidence, is one which places the inhabitants of this township in the same situation as the inhabitants of a parish, as to their legal liability to the repair of roads locally situated within their district. This circumstance distinguishes the case from those where the prescription stated on the record applies only to the particular road indicted. Then the question is, whether, in this case, the defendants have, with any degree of certainty, shown, that any other persons are liable to the burden. If the case had stopped with the repairs done by the participants, it would have been sufficient; but it does not

for we have the history of those participants stated in it, who are, it seems, the representatives of Cornelius Vermuyden, to whom King Charles the First [82] assigned one-third of "certain crown lands, then of little value, as a compensation for draining the whole. In pursuance of this agreement, the drain and bank were, in all probability, executed; and on the bank this road has since been made. I am, therefore, not at all satisfied that the road had any immemorial existence; and if so, that reduces the commencement of the repair, given in evidence, to the reign of Charles the First, which negatives any prescriptive liability on the part of these participants. I do not think, therefore, that the defendants have established, that the participants are liable, *ratione tenuræ*. And the circumstances seem also to me to negative their liability, by reason of inclosure. Upon the whole, I am of opinion, that there must be judgment for the crown.

BAYLEY, J. I am of the same opinion. The prescription stated in this indictment makes the township, for all legal purposes, as to repair of roads, a parish. Then, if so, these defendants are liable, unless they can throw the burden on some other persons. I entirely agree with my lord chief justice, that, from the circumstances stated in this case, we cannot make the presumption, that this was an immemorial highway, or that the participants are liable to repair it, *ratione tenuræ*. The repairs done by them are either referable to mistake, or to a disinclination, on their part, to throw the burden on the township.

HOLROYD, J. In this case the township is, by the prescription, placed on the same footing as a parish, both as to immemorial roads, and also as to any new highways which may have been subsequently made; and, [83] therefore, whether the road indicted be an immemorial highway or not, the defendants must repair it, unless they can show with certainty some other persons who are liable. The usage to repair, proved at the trial, would have been conclusive against the participants, unless there had been evidence to rebut it. That evidence however, seems to me to be satisfactory. Here the wastes and commons originally surrounded by rivers were drained, and one-third part of them was allotted as a reward to Vermuyden, for the drainage. This formed a new division, which had not existed before, and the repairs proved are only coextensive with that new division. It seems to me, therefore, to follow, as a very strong presumption, that the usage to repair could not have had any existence, previously to the drainage, but commenced at that time; for if it had commenced before, in all probability other lands, as well as those of the participants, would have also been chargeable. I think, therefore, that the defendants have failed in making out, that the participants are liable, *ratione tenuræ*. As to their liability, *ratione clausuræ*, it appears on the evidence, that the road was contemporaneous with the inclosure. But if it were clear, that the fence ditches were made at a subsequent period, still that would not make the participants, as a body, liable, but only those persons who actually made and continued the inclosure; and we have no evidence to show who those persons were, or that they ever repaired the road. I am, therefore, of opinion, that there must be judgment for the crown.

BEST, J., having been absent in the bail-court, during the argument, gave no opinion.

Judgment for the crown.

apprentice, during the winter, resided with his parents in the township of B. for more than forty days, not doing any work for his master during such residence: Held, that this was not a residence under the indenture, and conferred no settlement.

UPON appeal against an order of two justices, by which Solomon Marshall, his wife, and two children, were removed from the township of Whitby, to the township of Brotton, in the North Riding of the county of York, the sessions confirmed the order, subject to the opinion of this court, upon the following case:

The pauper, Solomon Marshall, was bound apprentice for the term of four years, by indenture, bearing date the 11th of March, 1813, and made between Solomon Marshall the elder, and Solomon Marshall the younger, of the one part, and one Addison Brown, master-mariner and ship-owner, of the other part. In which indenture it was provided, amongst other things, that the said master should find and provide for his said apprentice sufficient meat, drink, washing, and lodging, during the said term, *except in the winter seasons, when the ship to which he should belong should be laid by unrigged, during which time it was agreed, that the said apprentice should maintain himself, or be maintained by his friends;* and in lieu and satisfaction thereof, the said master should pay him, the said apprentice, the sum of 6s. a-week, weekly and every week during such time as the said apprentice should not be maintained by his said master; and that the said master should pay, or cause to be paid, unto the said apprentice, as and for wages for such his service, the sum of 75*l.*, in manner following; (that is to say,) 12*l.* for the first year; 16*l.* for the second year; 20*l.* for the third year; and 27*l.* for the fourth year; also 12*s.* a-year for washing. The said pauper, while the ship ^{*85} was laid up at Whitby, in which he served his said master as an apprentice, during the apprenticeship, resided, occasionally, during the winter, with his parents, in Brotton; and in the whole, for considerably more than forty days; and he slept the last night, during the continuance of the apprenticeship, at Brotton. Brotton is twenty miles distance from Whitby, and the pauper did not do any work for his master while he resided there, but was liable to have been recalled by his master at any time, if he had been wanted at the ship. The sessions were of opinion, that by this residence at Brotton a settlement was gained.

Tindal, in support of the order of sessions. This was a residence under the indenture; for it is expressly stipulated, in the indenture, that when the ship was laid up, in the winter season, the apprentice should reside with his friends; and this distinguishes the present case from *Rex v. St. Mary Bredin*, 2 B. & A. 382, where no such stipulation existed, and no settlement was gained. If there had been any clause in this indenture, enabling the apprentice to work for any other person, it would be different. But there is no such stipulation here.

Bolland, contra. This case falls within the principle laid down in *Rex v. St. Mary Bredin*. That principle was this, that a residence, in order to confer a settlement, must be connected with a service to the master at the time. Here it is not so connected; for no act of service to the master was done or contemplated during this residence at Brotton.

Abbott, C. J. This appears to be a stronger case than the one ^{*86} which has been cited, and that on the very ground on which it has been attempted to be distinguished from it. Here there was a distinct stipulation in the indenture, by which the master dispensed with the service of his apprentice, during the winter season, the period when this residence at Brotton took place. The residence, therefore, is not at all connected with a service; but is, by the very words of the indenture, disconnected from it. Then the case cited is an express authority to show, that an apprentice, by such a residence, does not acquire a settlement. The order of sessions, must, therefore, be quashed.

Order of sessions quashed.

The KING v. The Justices of the County of CARNARVON.

The court of K. B. has no jurisdiction to review the judgment of the quarter sessions, except on a case sent up for their consideration ; and, therefore, where the sessions, having heard the witnesses on one side, had refused to hear those on the other side in an appeal, on the ground that their testimony had been prefaced by observations on the part of the advocate, contrary to their usual practice, the court refused to grant a mandamus to rehear the appeal.

D'OVLY, Serjt., moved for a rule nisi for a mandamus, to be directed to the justices of Carnarvonshire, commanding them to enter continuances, and rehear an appeal between two parishes, touching the settlement of a pauper. It appeared from the affidavits, that the appeal came on at the sessions on the 14th of July last, and that the appellants having admitted a *primâ facie* settlement in this parish, relied upon the proof of a case of a subsequently acquired settlement elsewhere. Having finished their case, the attorney for [the respondents proceeded to make observations upon the case proved by the appellants, and then offered to call witnesses to contradict it ; but the sessions refused to allow those witnesses to be called, on the ground that he had rested his case on his argument as to the insufficiency of the case proved on the other side ; and thereupon they quashed the order of removal. The affidavits further stated, that the course pursued by the attorney for the respondents was the usual and ordinary practice of the sessions. D'Oyly, in support of the motion, contended, that the refusal on the part of the sessions to hear the witnesses was in fact a refusal to hear the appeal altogether, in which case it was every day's practice for this court to direct the sessions by mandamus to hear and decide the question.

BAYLEY, J. There is no instance, I believe, which can be found where this court have interfered by mandamus to direct the justices to rehear an appeal which they have once already heard. In this case they entered into the consideration of this appeal ; and, after having heard it, they have decided that the respondents ought not to be allowed to call witnesses in reply. It is possible that in that decision they may have been wrong ; but it seems to me that we are not at liberty to enter into that question, as no case has been sent up for our consideration. If we were to do so, we should constitute this court a court of appeal from the quarter sessions, and we should have applications continually made to us to overturn their determinations, on the ground of the improper reception or rejection of evidence, and be called upon to review their judgment, [although no case has been sent to us for that purpose. It is the duty of sessions to hear and decide ; and, if they entertain any doubts, to submit them to this court ; but where they do not desire our interference, we have no jurisdiction.

HOLROYD, J. If it had appeared in this case that the sessions had heard one side, and had altogether refused to hear the other, I should have thought it the same as if the case had not been heard at all, and I should then have been of opinion that this mandamus ought to issue ; but, in this case, it appears to me that this was merely a question as to the practice of the sessions, who have determined that the evidence tendered ought not to have been introduced with observations on the part of the advocate. I think, therefore, that this court has no jurisdiction to interfere in such a case.

BEST, J.,(a) concurred.

Rule refused.

(a) Abbott C. J., had left the court.

BYLES v. WILTON, Gentleman, one, &c.

An attorney in custody for debt loses his privilege, and may be detained upon mesne process.

GURNEY had obtained a rule nisi for entering an exoneretur on the bail-piece filed in this cause for irregularity. It appeared from the affidavits, that the defendant was an attorney of this court, and that having been for some time in custody in the Marshalsea for debts due to other persons, the plaintiff, on the 12th July last, filed his bill against him as an attorney, and, on the 18th July, delivered the bill, with the usual certificate of the clerk of the rules endorsed thereon, to one of the turnkeys of the prison, for the purpose of detaining the defendant in custody. The bail justified on the 3d August.

Scarlett now showed cause, and contended that as it appeared from the affidavits, that the defendant was already in custody, he had lost his privilege as an attorney.

Gurney and F. Pollock, contrà, referred to *Kaye v. Denew*, 7 T. R. 671, and *Prior v. Moore*, 2 M. & S. 606, as recognising a distinction between the cases where an attorney appears for others, and where he is sued or sues himself; but contended that at all events this rule must be absolute, because the declaration stated him to be "present here in court," and so treated him as a person having privilege, which was inconsistent with the mode of its service.

The Court held that, being in custody, the defendant was not entitled to his privilege, the ground for allowing privilege being, that an attorney is an officer continually attending upon the court. In this case, however, he cannot do so; and this is like an attorney ceasing to practise, who loses thereby his privilege. But as the declaration was defective, they discharged the rule without costs, giving, at the same time, liberty to the plaintiff to amend his bill.

Rule accordingly.(a)

(a) See *Windmil v. Cutting*, 1 Str. 191.

*Ex parte LEACROFT, Gentleman, one, &c.

[*90]

An agent employed to take out an attorney's annual certificate, having neglected so to do, and the attorney having from ignorance of the fact continued to practice, the court will only allow him to be readmitted upon payment of the arrears and a fine.

READER moved that this person might be readmitted as an attorney without the payment of any fine. It appeared that he had employed an agent to take out his certificate annually, and had continued to practise up to the time of the application; but his agent had neglected to do it. As soon as he had discovered it, the present application was made to the court.

ABBOTT, C. J., said, that the court had had many applications of this sort, and that they thought it expedient, for the good of the profession, that attorneys should take care to make inquiries, and to inform themselves as to the fact whether such certificates were taken out, and to have such certificate sent down to them annually. And that, therefore, in order to establish this as a rule on this subject, they would not in any instance, readmit, without a fine being also paid. In the present case, however, they would only impose a small fine for the purpose of marking the rule; and, therefore, they ordered that the party should be readmitted on the payment of the arrears of duty and a fine of 5l.

Rule accordingly.

*FARMER and Another v. THORLEY and Another.

[*91]

The bail to the sheriff are discharged by the defendant's giving a cognovit for payment of debt and costs.

PULLER, on a former day having obtained a rule for staying all proceedings upon the bail-bond in this case,

Bolland now showed cause, and the facts appeared to be, that on the 4th May last, a bill of Middlesex, returnable on the 8th of May, issued at the suit of the plaintiffs against the principal, when the present defendants became bail to the sheriff, and executed the usual bail-bond; that two days after the time which the bail had, by the practice of the court, for putting in bail above, an agreement was entered into with the principal and his attorney, but wholly without the knowledge of the bail, for a cognovit, to secure and pay the debt on the 20th July following, which was after the close of Trinity term, and the attorney's costs were at the same time paid; and that on the 20th September following, an assignment of the bail-bond was taken, and writs sued out thereon, against the bail, returnable the first return of this term. It was insisted that the several cases where it has been decided that a cognovit, with stay of execution, is a discharge of the bail, apply only to bail above, and not to bail to the sheriff; the applications, in all these instances having been made on behalf of the bail above.

But the court were of opinion, that bail to the sheriff were also discharged by such a proceeding, the plaintiffs having no right to proceed upon the bond, unless there was a continuing breach, which could not be, where a cognovit had been taken, that being an admission by the plaintiffs, that the defendant had appeared to the action, and was properly in court.

Rule absolute.(a)

(a) [See Wightwick, 121, *Brown v. Neave*; 1 Taunt. 159, *The King v. Sheriff of Surrey*; 5 D. & E. 277, *Hodges v. Nugent*.]

*ROBERTS v. GOFF.

This court will set aside a judgment founded on an usurious security, without compelling the defendant to repay the principal and interest.

Puller had obtained a rule, calling upon the plaintiff to show cause why the judgment entered on the warrant of attorney in this case, and the execution thereof, should not be set aside, and the warrant of attorney be delivered up to be cancelled, on the ground of usury.

Dwarris now showed cause, and contended, that even if the court were satisfied of the usury, after the parties had acted on the agreement, and time had been asked and given, they could not now set aside the judgment, and direct the security to be cancelled, but upon the terms of the party paying the money actually advanced, with legal interest, this being an application to the equitable jurisdiction of the court, which would compel the party applying to do what is equitable and reasonable; and he cited *Hindle and O'Brien*, 1 Taunton, 413.

BAYLEY, J.(a) We cannot impose such terms. The instrument is void. It is not good at law. The construction and practice of this court have always been different; and I have reason to know, that some of the learned persons who argued that case in the common pleas, were not, at the time, at all satisfied with the decision.

HOLROYD and **BEST**, Js., concurred.

Rule absolute.

(a) Abbott, C. J., had left the court.

*TAYLOR and Others v. HARRIS.

Defendant having pleaded in abatement that four others were jointly liable with himself, the plaintiff applied to the defendant's attorney to give the places of residence and addressees of those persons, which he refused, unless the action were discontinued. Under these circumstances the court made a rule absolute for the defendant to deliver such particulars, or in default thereof for setting aside the plea.

ASSUMPSIT for the price of goods sold to the defendant, one of the proprietors of Covent Garden theatre. The defendant pleaded in abatement, in the usual

form, that four other persons (naming them) were jointly liable with himself. *Carter*, upon this, obtained a rule to show cause why the defendant should not forthwith deliver to the plaintiffs, or their attorney, particulars in writing of the places of residence and additions of the several persons mentioned in this plea, or why, in default thereof, the plea should not be set aside. The affidavit stated, that the plaintiffs had no knowledge whatever of the places of residence of these persons, nor where they could be met with, and that, in order to become acquainted with the same, for the purpose of ascertaining the truth of the plea, or whether it would be advisable or not to abandon the proceedings in the action, they had made application to the defendant's attorney (the defendant himself being absent in Ireland), and also to the person who had made the affidavit of the truth of the plea, and to the treasurer of the theatre, for the required information; but that these parties had refused to give it, except upon condition that the action against the defendant should be discontinued. [94]

Moore showed cause against the rule, and contended, that the defendant had done all he was bound to do, by giving the plaintiffs a better writ, and that, at all events, the condition of discontinuing the action was reasonable.

The Court held, that substantially the defendant had not given to the plaintiffs a better writ, and that the information ought to be given without any such condition as had been required. For, possibly, the plaintiffs might ascertain, when the information was given, that the present action was proper, and might choose to reply to the plea, rather than abandon the action.

Rule absolute.

*The KING v. Sir FRANCIS BURDETT, Bart.

[95]

On an information for writing, composing, and publishing a libel in the county of L., it appeared that the defendant, on the 22d August, wrote and composed the libel in L., and that he was seen in L. on that and the following day. On the 24th, the libel was delivered in the county of M. (100 miles off) by A. to B., being inclosed in an envelope addressed to A., containing written directions to forward the libel to B., by whom it was subsequently published in M. The envelope was open; and it was not proved that there was on it any trace of a seal or post-mark. A. was not called at the trial as a witness by either party; nor was it proved that he was a resident, or had been about that time in L.: Held, by three justices, (dissentente Bayley, J.,) that this was evidence on which the jury might properly be left to presume that the libel was delivered open to A. in L.

Held, also, by three justices, (Bayley, J., dubitante,) that a delivery at the post-office in L. of a sealed letter, inclosing a libel, is a publication of the libel in L. Held, also, by three justices, (Bayley, J., dubitante,) where a defendant writes and composes a libel in L. with the intent to publish, and afterwards publishes it in M., that he may be indicted for a misdemeanor in either county.

And, *per totum Curiam*, where a libel imputes to others the commission of a triable crime: Held, that evidence of the truth of it is inadmissible. Held, also, where, in summing up, the judge told the jury that the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances; and that, if its contents were likely to excite sedition, &c., defendant must be presumed to intend that which his act was likely to produce; and that, if they found such to be the intent, he was of opinion it was a libel; and that they were to take the law from him, unless they were satisfied that he was wrong; that this was a correct mode of leaving the question to the jury under 39 G. 3, c. 60, s. 1.

Quare, whether the writing and composing of a libel with intent to publish, but not followed by publication, be an offence.

THE Attorney and Solicitor-General, with whom were Vaughan, Serjt., Clarke, Reader, and Balguy, were heard in last term against the rule for the new trial. (Vide Vol. 3, p. 717.) Besides the cases referred to in their argument, they cited *The King v. Hensey*, 1 Burr. 642, to show that the circumstance of a letter being dated in a given place was evidence that it was written there. Scarlett was then heard in support of the rule; and, in this term, Denman, Phillipps, Blackburne, and Evans, were heard on the same side. The arguments in support of the rule were as follow: (a)

(a) See the evidence at length in the judgment of Best, J.

The writing of a libel, without publication, does not constitute an indictable offence. The crime of libel consists in the tendency to a breach of the peace produced ^{*96]} by the communication of slander to the minds of others, by writing. No crime is therefore committed until the slander is so communicated ; or, in other words, until the publication, for till then there can be no tendency to a breach of the peace. This is deducible from the very nature of the crime. It has been observed by Mr. Starkie, in his preface to the Law of Libel, that crimes which affect the visible property or persons of men, are much more obvious to the understanding than the crime of libel, which is of a more intellectual nature ; and, therefore, the law respecting the former is much more likely to be founded on just principles in its commencement in the more simple state of society, than those laws which, arising out of a more complicated state of society, and relating to a more refined object, call for more refinement in observation, and greater discrimination between the good to be done by enacting penalties, and the mischief to be done by repressing a practice generally useful. One of the most refined conclusions at which a refined state of society can arrive, is, that a man should have a solid property in his reputation. It is one of the greatest privileges that belong to the nature of man, that he possesses a sensibility to fame and a love of glory, and that the individual, by the combination of opinion and the force of character, begets in his own reputation a property more valuable than the mere materials to which the crude notions of property are first applied. The circulation of written papers, and the art of printing, would give rise to great variety in the degrees of this offence. When it was found to injure the opinion and respect in which a man was held, or by which the government was supported, as the character of individuals as well as ^{*97]} the security of a government, not upheld by ^{*brute force,} are founded on opinion and respect, it became important to punish those who destroyed that opinion and respect by written slander. It was long after it was the habit in enlightened Rome for every man of respectable rank to be in possession of books, that the law *De libellis famosis*, was promulgated. [ABBOTT, C. J. Cicero, in a fragment of his, Book 4, "De Republica," says, that it was to be found amongst the laws of Twelve Tables.] That passage in Cicero has a reference to the practice of exhibiting individuals on the stage. It is to be found in the fragments of his book "De Republica," preserved by St. Augustine in his book "De Civitate Dei," and the passage is as follows : "Nostræ contra duodecim tabulae cum perpaucas res capite sanxissent, in his hanc quoque sanciendam putaverunt; si quis actitavisset, sive carmen condidisset, quod infamiam faceret flagitiumve alteri; præclare, judiciis enim ac magistratum disceptionibus legitimis propositam vitam non poetarum ingenii habere debemus, nec probrum audire, nisi ea lege ut respondere liceat et judicio defendere." The *probrum audire* refers to the hearing the actor, who represents the character attacked by the *malum carmen* of the poet. In one of the fragments of the same work, also preserved by the same author, St. Augustine, there is a reference to the poets who composed for representation, "probris et injuriis poetarum subjectam vitam famamque, habere noluerunt capite etiam puniri sancientes *tale carmen* condere si quis auderet." By *tale carmen* is meant such a composition as was actually represented on the stage, and not a mere private unpublished composition. In order to explain this, some illustration may be found among the poets themselves, and particularly in the second book ^{*98]} of Horace's Epistles, *verse 139, where he alludes to the very law of the twelve tables, by which the infamy must have been attached and fixed to the individual by representation, which was a publication. The words of the law are these : "Si quis occentasset malum carmen sive condidisset quod infamiam faxit flagitiumve alteri, capital esto." The words, it is to be observed, are not *ad infamiam tendens* but *infamiam faxit* ; and so in the interpretation of Cicero, in the fragment quoted, the words are, "quod infamiam afferret

flagitiumve alteri." It would seem, therefore, that the infamy must have attached, and that the mischief must have occurred before punishment could be inflicted on the author or actor. It appears also, from Suetonius, *De Vita Augusti*, c. 55, that the law de famosis libellis did not exist in early times in Rome. "Etiam sparsos de se in curia famosos libellos, nec expavit nec magnâ curâ redarguit: Ac ne requisitis quidem auctoribus: Id modo censuit cognoscendum posthac de iis qui libellos aut carmina ad infamiam cuiuspiam, sub alieno nomine edant." It is remarkable, that Augustus, if there was already in existence a law to punish libels with death, should not only have prosecuted none of them against himself, but should have introduced another law to subject those which were anonymous to legal restraint. Tacitus, in the first book of his annals, says, "Primus Augustus cognitionem de famosis libellis specie legis ejus (i. e. legis majestatis) tractavit; commotus Cassii Severi libidine, quâ viros fœminasque illustres procacibus scriptis diffamaverat." And Suetonius, in his life of Tiberius, has this passage on the subject of libels, chapter 28. "Adversus convitia malosque rumores, et famosa de se ac suis carmina firmus ac patiens, subinde jactabat in civitate liberâ linguan mentemque liberas *eae debere. [99] Et quondam Senatu cognitionem de ejusmodi criminibus ac reis flagitante, non tantum, inquit, otii habemus ut implicare nos pluribus negotiis debeamus." So that when the Senate requested him to punish those who circulated libels against him, Tiberius replied "that he should have too much upon his hands, if he were to add any care of his own person and reputation to that which he was bound to bestow upon the safety and dignity of the state." The same author says of Julius Cæsar, that he was so regardless of certain epigrammata famosa and scurrilous verses that were current against him, that he proposed a reconciliation with one of the authors, and invited another to sup with him. Now, notwithstanding the clemency of Cæsar, it is extraordinary that such things should circulate if they were the subject of capital punishment. It seems unaccountable, indeed, how the word famosus was introduced unless it had a reference to publication. The very word has relation to a thing bruited abroad and bottomed in fame. In the best period of Roman literature, it had, indeed, acquired a bad meaning. Cicero uses famosa to express a courtesan, "ad famosas mater me vetat accedere," where it combines the reputation of being *public* with an actual want of chastity. So, there is a passage in Horace, "Si quis mœchus foret, aut sicarius, aut alioqui famosus." Here *alioqui famosus* means otherwise notorious for some vice. The word famosus, therefore, in its natural sense refers to notoriety. Unless that notoriety is effected in a libel by its publication, where is the offence? There must be something done to simulate individual revenge or public discontent. If it is kept secret it wants the very essence of the meaning of the word famosus, by which the civilians describe *it. The very essence of the crime, whether it be against an individual or the public; whether we look to the nature of the crime itself, [100] or the word by which it is described, consists in the publication. The passages already referred to from the civil law, apply to a case of publication; for, to make it a crime, according to those authorities, it must be *ad infamiam*. It cannot be *ad infamiam* unless the fame of some person be affected by it, and that cannot be done unless it is published.

Lord COKE, in *Lamb's* case, means to say, that the actual publisher was guilty, though he was neither the writer nor composer. Assuming the publication, he says this; "That every man who shall be convicted of a libel, either ought to be a contriver of the libel, or a malicious publisher of it, knowing it to be a libel;" meaning, that if he is the malicious publisher, though neither the author or contriver, he is guilty of the libel. If this be taken according to the very letter, it would not only establish, that the writing, without publication, would be an offence, but that the person who publishes it, without knowing it to be a libel, would be guilty of no offence which is contrary to the law as now

established. Mr. Starkie, in his treatise on the Law of Libel, after reviewing all the cases upon the subject, seems to be of opinion, that by the law, as now understood, publication is necessary, to constitute the offence ; and that opinion has generally prevailed in the profession, since the case of *Entick v. Carington*, 19 Howell. St. Tr. 1030. The case of *The King v. Payne*, no judgment ever having been pronounced in it, must be considered as one of doubtful authority. The opinion of the court, as given in *5 Mod. 167, is this : *101] “The making of a libel is an offence, though never published ; and if one dictate and another write, both are guilty of making it. To what purpose should any one write or copy after another, but to show his approbation of the contents, and to enable him to keep it in his memory, that he may repeat it to others. Now, though the bare reading of a libel may not be a crime, because a man may be surprised, and not understand what he is about to read ; yet, when one takes it from another, and hears it spoken before he writes it, this cannot be by surprise, because he has time to exercise his thoughts before he writes ; so that it is not a libel by repeating but by writing. If one repeat, and another write a libel, and a third approve what is written, they are all makers of it ; for all persons who concur, and show their assent and approbation to do an unlawful act, are guilty. So that murdering a man’s reputation, by a scandalous libel, may be compared to murdering his person ; for if several are assisting and encouraging the man in the act, though the stroke was given by one, yet all are guilty of homicide.” According to this authority, if any man shows his friend an epigram, in which there is a reflection on another, and he takes a copy of it to look at for his amusement, he is guilty, because he may publish ; but it might as well be contended that a man can be guilty of shooting at another by keeping a gun, merely because somebody might take it and charge it. Again, the offence of libel is compared to that of murder ; but how is a man’s reputation murdered by a libel never published ? In *The King v. Beare*, 1 Ld. Raym. 414, Carth. 407, 2 Salk. 417, Lord Holt says, that “It was objected that writing a libel may be a lawful act, as by the clerk who draws the *indictment, or by a student who takes notes of it, and so the *102] defendant’s might be a lawful writing :” to which the judge said, “That the matter, abstractedly considered, is unlawful ; therefore the general finding shall be taken to be criminal ; and that if the writing was innocent, as in the case objected, there ought to be a special finding of those particulars which distinguish and excuse it. If an action be brought on the statute of maintenance it is sufficient to say quod manu tenuit, yet in some circumstances a man may lawfully maintain a suit as an attorney or near relation.” The answer to the last observation is obvious ; the words of a statute are always deemed sufficient in a declaration or indictment upon that statute ; for the words must receive the same construction on the record as they do in the statute, and the defendant has, therefore, the opportunity, when charged in the words of the statute, of insisting upon all the proofs required, and making all the defences allowed by the statute. The principle laid down by Lord Holt is this : if a man should write a libel, or buy it of a bookseller, and keep the libel locked up in his closet, and there it should be found, the onus probandi is cast upon him, to show an innocent intention. Look to the consequences of such a rule. It has been laid down that a man may be guilty of a libel on those who have gone before him, and even upon a foreign prince or government. Now, there is hardly any book that does not in some passage contain a libel on the living or the dead, on princes or on governments. Or, suppose a man writes a libel and puts it in his closet, who can prove his intention but himself ? and he, if prosecuted, would not be a competent witness for that purpose. Lord Holt proceeds ; “That the jury having found the *defendant guilty of writing a *103] libel, he must be taken to be guilty of writing the original, and a copy could not be given in evidence ; on the other side, if the copy of a libel be a

libel, then the writing of it is a great offence; but that people may not go away with a notion that writing of a copy, though by one that has no warrantable authority, is not libelling, the chief justice said, that such a copy contained all things necessary to the constitution of a libel, viz. the scandalous matter and the writing. It has the same pernicious consequences; for it perpetuates the memory of the thing, and some time or other comes to be published." That is an assumption, and Lord HOLT had no right to assume that they would ever be published; and the possibility of their being subsequently published never can constitute an offence. There were authorities decided a very few years before *The King v. Beare*, fully justifying the doctrine laid down by Lord HOLT, and which, no doubt, he had strongly in his mind at the time. In *The King v. Eades*, 2 Shower, 468, the defendant was tried at bar, in the second year of James the Second, on an information for commanding a book in which were several seditious sentences and clauses, and convicted; and although there was a motion in arrest of judgment, on the ground that it was not averred that he either read or knew these sentences to be therein; yet, afterwards, all exceptions were waived, and, upon the defendant's submission, he was fined 100*l.* In *The King v. Williams*, ib. 471, the information was for publishing a libel, called "Dangerfield's Narrative." The defendant pleaded that by the law and custom of England the speakers of the house of commons signed and published the acts *of the house, and that he signed the paper in question as an act of and by order of the house. He was, however, fined 10,000*l.* [*104] for this offence. These cases would not be considered as authority at the present day, but they may possibly have been considered as such by Lord HOLT, having been decisions which no act of parliament had reversed, and which no resolution of parliament had condemned. It is true that before the cases of *The King v. Payne*, and *The King v. Beare*, the Revolution had intervened; but the statute for licensing the press was in existence after the Revolution. Upon the expiration of the licensing act, in the reign of Charles the Second, the twelve judges were assembled to discover whether the press might not be as effectually restrained by the common law as by that act. They came to this resolution, that it was criminal at common law not only to write public seditious papers and false news, but likewise to publish any news without a license from the king, though it were true; and in *The King v. Harris*, 7 Howel's State Trials, 929, Scroggs, C. J., lays down the same rule. Now Lord HOLT, and the judges who assisted him, some years after the Revolution, were placed in the same predicament as the judges stood in at the expiration of the licensing act in the reign of Charles the Second. In the 5 W. 3, the licensing act, having been prolonged for one year, had expired. An ineffectual attempt was made to renew it in parliament. It was, therefore, not unnatural that Lord HOLT and the other judges might, to a certain extent, feel themselves bound by the authority of the judges on the like occasion, and conceive that there was some principle of law that warranted them in the determination that they made in these *cases; and they might, perhaps, be willing rather to refer to antecedent [*105] authorities for the opinions they had imbibed than to the authority of those later judges, whose memories were brought into merited odium, by their attempts to support arbitrary power. *The King v. Eades*, which was a prosecution for approving a libel, was, however, the only authority for that doctrine, which was again laid down in *The King v. Payne*. Lord HOLT, indeed, refers to the authority of Lord COKE, in the case *De Libellis Famosis*, 5 Rep. 125, and to *Lamb's* case. The charge in the former case was, for composing and publishing a libel, and three points were resolved, first, every libel which is called *famous libellus seu infamatoria scriptura*, is made either against a private man or against a magistrate or public person. If it be against a private man, it deserves severe punishment; for although the libel be made against one, yet it excites all those of the same family, kindred, or society, to revenge, and so

tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience. Here Lord Coke gives the definition of the crime, and states it to consist in its tendency to excite a breach of the peace. But how can it tend to a breach of the peace unless the individual libelled, or some person connected with him, should see it. The very definition of the offence, therefore, shows that it lies in the publication. Lord Coke then states the different modes of publication ; but there is nothing to show that he thought that the bare act of writing, without publication, was a crime. In *Lamb's* case, 9 Rep. 59, a bill was exhibited in the star-chamber against certain persons for publishing two libels, and the question was, what constituted that sort of publication which, in that particular ^{*106} case, justified the conviction ; and it was considered how far the writer or contriver of the libel should, in that case, be deemed the publisher ; and Lord Coke says, "If a person writes a copy of a libel, and does not publish it to others, it is no publication ; for every one who shall be convicted ought to be the contriver, procurer, or publisher of it, knowing it to be a libel ; but it is great evidence that he published it when he, knowing it to be a libel, writes a copy of it, unless he can prove that he delivered it to a magistrate." Now, it is singular that Lord Coke should lay down with so much exactness the presumptive evidence of writing to support a charge of publication ; and yet not mention that the act of writing alone, without publication, would constitute an offence. It appears, from the report of the same case in *Moore*, that the whole question was, what should be evidence of a publication. The case of *John of Northampton*, referred to by Lord Holt, is a case of publication, or at least if it does not sufficiently appear that the letter had been received, it is then ambiguous and of doubtful authority. It appears, from *Edwards* and *Wootton*, 12 Coke, 35, that it was even doubted in the star-chamber whether a sending a libel to the party libelled was such a publication as to give that court jurisdiction. It never could have been imagined, therefore, by those who presided there, that the mere writing without publication was criminal. *The King v. Knell*, 1 Barnardiston, 305, was a mere nisi prius case, where the party is reported to have been found guilty of the printing, and acquitted of the publishing ; but printing is a species of publication, for copies must at least be delivered out to be revised and corrected.

^{*107} When the libel bill was in its progress through parliament, the judges were summoned by the house of peers, and certain questions were put to them. And in answer to one of these questions, Lord Chief Baron Evre, in delivering the opinion of the judges, states expressly, that (22 How. St. Tr. 300) "the crime consists in publishing a libel ; a criminal intention in the writer is no part of the definition of the crime of libel at the common law." This is an authority of the Twelve Judges in modern times, to show that the offence consists in the publication. It is admitted, that to support a civil action there must be a publication ; because, otherwise, there can be no damage. If so, there can be no wrong without publication, and shall it be said, that a man shall not have an action when there is no publication, because there is no wrong without publication, but that the king shall indict for the mere writing, when the individual is neither wronged in his character nor roused in his feelings ? The public offence grows out of the private injury to the individual. It arises out of the injury to his name and reputation, which cannot be effected till the writing is published, or in other words, until its contents are communicated to the minds of others. It has been argued, that the offence of libel bears a strong analogy to forgery, at common law, and that inasmuch as the false making of an instrument, with intent to defraud, is an offence at common law, although the instrument never be uttered ; it follows that the writing of a libel with intent to defame, is an offence, although that libel be never published. These offences however, are very different in their nature. In the

offence of forgery, the *crimen falsi* is completed by the very act of false making the instrument, accompanied with the intent to defraud. The offence of libelling, on *the other hand, is not complete until the contents of the libel are communicated to the minds of others, because until that time the reputation of the party is not injured, nor is his resentment roused. If this doctrine is to prevail, that the mere writing is *prima facie* criminal, there is not any one work that has adorned the literature of any country, or that has lashed the vices of any age, or that forms part of the intellectual riches of any nation, that might not have been the subject of criminal prosecution ; and the extreme absurdity of such a consequence surely affords no inconsiderable argument, that the premises from which it is deduced are fallacious. The mere writing and composing a libel not followed by publication, is, therefore, no offence known to the criminal law of England.

It has been further argued, that where several acts constituting an offence, take place in different counties, the offender may be indicted in any of those counties ; and that in this case, inasmuch as the offence is composed of the writing and publishing, and the writing took place in Leicestershire, that the defendant may be indicted in that county, although the libel was only published in Middlesex. The case of a windmill erected in one county and proving a nuisance in another, has been mentioned. Assuming that it may be indicted in the county where it operates as a nuisance, how is it to be abated ? How is the sheriff to execute, out of his own county, the judgment *quod prosternatur nocumentum*. This shows that the party can only be indicted in that county where he does the act. In misdemeanors, which are trespasses, the venue must be laid in the county where the trespass is committed. This part of the case was so fully argued when the rule *nisi* was moved for ; *and the several authorities upon the subject so fully considered, that it is unnecessary to pursue it any further. If the rule contended for be the correct one, the power which it would give to the crown to multiply its tribunals would be indeed alarming. For, if a man, conceiving libellous matter, bought the paper, pen, and ink in A., wrote the libel in B., put it into the post in C., and caused it to be delivered in D., there to be published ; then, according to the argument, the party might be indicted in any one of these four counties. And the crown would thereby have the power of selecting that county in which they might obtain a jury disposed to convict the defendant. Such an option would naturally excite a strong suspicion of partiality in the administration of criminal justice, and would, therefore, be against sound policy.

It has been further contended, that in this case there was evidence of a publication in Leicestershire ; and it is said, that where a libel has been put into circulation by the act of the defendant, it must be taken to be published by him in the place in which he parted with the possession of it for the purpose of publication ; and that, in this case, it was clear, at all events, from the evidence, that the defendant did part with the possession of the libel in Leicestershire, either by putting it into the post, or delivering to a servant or to some other person for the purpose of transmitting it to London. The case of *The King v. Watson*, 1 Campb. 215, was cited as an authority to show that the putting a sealed letter into the post was a publication ; but that is only a *nisi prius* case, and therefore of no great authority ; and, besides, Lord ELLENBOROUGH did not decide that that was a publication, for there being no proof that it had the genuine post-mark on it, he held *the proof of publication insufficient. *Rex v. Williams*, 2 Campb. 506, was the case of sending a letter with intent to provoke a challenge ; the letter sealed was put into the post-office in Westminster, addressed to the prosecutor in London, by whom it was received. It was contended that there was no evidence of any offence having been committed in Middlesex, the letter not having been seen by any one there ; but Lord ELLENBOROUGH held, that an offence had been committed in Middlesex, and he

said that, had the letter never been delivered, the defendant's offence would have been the same. In that case the sending is the gist of the offence, and there need not be any publication. The crime of sending a challenge does not consist in its tendency to a breach of the peace, but has ever been considered as an actual breach of the peace. The act of writing and sending a challenge is therefore criminal, although the challenge never arrives; in like manner as the giving a loaded pistol to a man, and desiring him to shoot another, is criminal though no shot is fired. The act of sending is the crime in the one case and the other; for if in the one case he puts the challenge into his pocket, and in the other the loaded pistol, and changes his purpose, he has the benefit of the locus penitentiae, and is not guilty; but if the pistol be actually given to the servant to shoot another, or the challenge actually sent, and before the orders are obeyed the person carrying the pistol or the challenge is intercepted by a magistrate and disclosed the facts; can any man doubt that the party sending him might be indicted for a misdemeanor, though his objects were in neither *111] case accomplished? In the crime of libel, however, *publication is essential to constitute the offence. If the intention to publish be defeated, the crime is prevented. Every indictment contains the charge of publication, but in the case of a challenge, publication is no part of the charge. The evil design manifested by some overt act of a criminal character, and of immediate danger, though arrested before its final object be accomplished, constitutes a crime, as in the case of delivering the loaded pistol. Publication means the making public; the law, indeed, declares that a communication to one individual is a making public, but neither the law nor common sense can call concealment a publication. It can be no publication, therefore, to put a seal upon a letter and put it into the post; it is an act towards a publication, and if the law defined that act as a crime per se, it might be indicted in the county where it was committed. But that act is in itself a concealment; and to indict a man for a concealment and call it a publication, in order to make a constructive crime, not only violates the principles of common sense, but perverts the plain meaning of words. It is trifling with common sense and common understanding, to say that a man is guilty of publishing a letter by the very act of taking the greatest pains to conceal its contents from every eye but that of the individual whom he intends to see them in another place. He may intend to publish it, and the putting of it into the post may be evidence of that intention, but the intention to do an act which is not done does not make that act; the intention to murder is not murder, nor the intention to publish a publishing. It may be said, however, that the term publication does not necessarily mean a communication of the *112] contents of the instrument, and the publication of a will *or of an award may be referred to; there the term publication means no more than the execution or acknowledgment of the particular instrument in the presence of the witness who can identify it. The act of publication in both those cases is confined to the character and identity of the instruments, and therefore need not extend to their contents. The publication, therefore, which the law requires of a will or an award is a communication to others of the nature of the act done, and not of the contents of the instrument; but that term, when applied to a libel, must mean a communication of the contents of the libel, for until that takes place, there can be no tendency to a breach of the peace.

By the rules of pleading, the charge may either be stated upon the record in precise and understood words, or according to their legal effect; that is to say, you may either use a known word or its legal definition. This is a general rule; there are certain exceptions in cases of a highly penal nature, where the law in favour of life, demands greater strictness; as in an indictment for murder, the word *murder* is indispensable, but in misdemeanor, the offence may be well described by its definition. Now the technical definition of the crime of libel is, that it is an excitement to a breach of the peace by means of a written instru-

ment containing matter injurious to the fame and character of another. Suppose that the indictment omitted all words of publication, and charged the defendant in the language of the definition of the crime of libel: viz. that he in the county of Leicester, did unlawfully excite some particular person to commit a breach of the peace by means of a certain written paper, containing the matters following; and then setting *forth the libel. Now, would it have been sufficient to prove that the defendant, in the county of Leicester, wrote the paper; that he there sealed it, and put it into the post, although the person to whom it was addressed never received it? Clearly not, because that would be no evidence of an excitement in the county of Leicester. Excitement is the operation of some act upon the mind of another, and the writing can have no tendency to a breach of the peace, according to the definition, till it begins to operate upon the mind of him whose passions it was intended to provoke. This is the technical definition of the offence of libel. But if we take that which is the more enlarged and correct definition, viz. an injury done to the feelings, the good fame, and the reputation of another, by means of a written instrument, and suppose that the indictment charged that defendant did at a certain place injure the feelings of another by means of certain writing; could it be contended that the merely putting the letter into the post would be any evidence that the feelings or fame of another had been injured? The definition shows that the reputation must be affected, or the mind of the individual wounded, and this must be proved to be done in some particular place; whereas, if the paper has never been seen by that individual, or any other, neither can his fame have been affected, nor his passions inflamed in any place. The crime is not consummated until some person has seen the paper; that is, until publication.

The only question, however, submitted to the jury upon the question of publication was, whether, inasmuch as the letter was never proved to have been sealed, Sir F. Burdett might not be presumed to have delivered it open in the county of Leicester. *Now, that proposition involves two parts: first, that Sir F. Burdett delivered the letter to some person in the county of Leicester; and, secondly, that he delivered it open. There was no evidence to support either part of this proposition. It was proved that the defendant's place of residence was within a few miles of the county of Rutland. He was seen riding in the county of Leicester on the 22d of August, and the following day; but there was no evidence whether the nearest post town was in the county of Leicester or of Rutland. If the nearest post town were in the latter county, the probability would be that the letter would be put into the post-office in that county; and if that be a publication, it would be a publication in the county of Rutland. It was incumbent on the prosecutor, however, to prove that the defendant parted with the possession of the letter in the county of Leicester. The second part of the proposition is, that the defendant delivered it open in the county of Leicester. Now, there not only was no evidence of that, but it is directly contrary to the evidence; for the letter arrived in London at the very time when it would have arrived in due course of post. The presumption, therefore, is, that it came by the post, the ordinary mode of conveying letters. It was inclosed in a cover containing written directions to Mr. Bickersteth. It is probable, therefore, that the defendant did not deliver it in person to Mr. Bickersteth; but that, when he parted with it, it was under seal, that being the ordinary mode of transmitting letters accompanied with confidential instructions, by the post or by a servant. Taking the case according to probability, the presumption is, that the letter was sent sealed by the post. The other presumption involves the superposition that Mr. Bickersteth *was in Leicestershire, of which there was no evidence at all, and is a presumption contrary to the ordinary course of things. It was incumbent on the prosecutor to establish the fact by calling Mr. Bickersteth. For no presumption ought to be made in a criminal case.

Another ground upon which the defendant is entitled to a new trial is, that the learned judge rejected evidence of the truth of the facts represented in the libel to have taken place at Manchester. Now, that evidence ought to have been received; because the effect of it might be to alter wholly the nature of the libel. If the facts were true, the question, whether the publication were a libel or not, would depend upon this, viz. whether the comments were warranted by the facts. If, on the other hand, the facts were false, the very statement of them would constitute a libel.

Another ground of objection to the verdict is, that the learned judge told the jury that they were to take the law from him as to whether this were a libel or not. Now, by the 32 Geo. 3, c. 60, the jury are empowered to give a general verdict upon the whole matter in issue; and, consequently, are to find whether the publication be a libel or not.

Cur. adv. vult.

*116] *There being a difference of opinion on the bench, the judges now delivered their opinions seriatim.

BEST, J.(a) This case came on for trial before me at the spring assizes for

(a) The information being frequently alluded to by the learned judges in delivering their opinions, it may be proper to give the first count:

Leicestershire to wit. Be it remembered that Sir Robert Gifford, knight, attorney-general of our present sovereign lord the king, who for our said lord the king prosecutes in this behalf in his proper person, comes here into the court of our said lord the king, before the king himself at Westminster, on Saturday next after the morrow of All Souls, in this same term; and for our said lord the king gives the court here to understand and be informed that Sir F. Burdett, late of Westminster in the county of Middlesex, baronet, being a seditious, malicious, and ill-disposed person, and unlawfully and maliciously devising and intending to raise and excite discontent, disaffection, and sedition among the liege subjects of our lord the present king, and amongst the soldiers of our said lord the king, and to move and excite the liege subjects of our said lord the king to hatred and dislike of the government of this realm, and to insinuate and cause it to be believed by the liege subjects of our said lord the king, that divers of the liege subjects of our said lord the king had been inhumanly cut down, maimed, and killed by certain troops of our said lord the king, heretofore, to wit, on the 22d day of August, in the 59th year of the reign of our sovereign lord George the Third, by the grace of God, of the united kingdom of Great Britain and Ireland, King, Defender of the Faith, at Loughborough, in the county of Leicester, unlawfully and maliciously did compose, write, and publish, and cause to be composed, written, and published, a certain scandalous, malicious, and seditious libel of and concerning the government of this realm, and of and concerning the said troops of our said lord the king, according to the tenor and effect following, (that is to say) " To the electors of Westminster, gentlemen, on reading the newspapers this morning, having arrived late yesterday evening, I was filled with shame, grief, and indignation, at the account of the blood spilled at Manchester; this then is the answer of the boroughmongers to the petitioning people, these the practical proof of our standing in no need of reform, these the practical blessings of our glorious boroughmongers' domination, this the use of a standing army in time of peace. It seems our fathers were not such fools as some would make us believe, in opposing the establishment of a standing army, and sending King William's Dutch guards out of the country. Yet would to Heaven they had been Dutchmen, or Switzers, or Hessians, or Hanoverians, or any thing rather than Englishmen, who did such deeds. What! kill men unarmed, unresisting! and, gracious God, women too, disfigured, maimed, cut down, and trampled on by dragoons! (meaning the said troops of our said lord the king, and meaning thereby that divers liege subjects of our said lord the king had been inhumanly cut down, maimed, and killed by the said troops of our said lord the king.) Is this England? This a christian land? a land of freedom? Can such things be and pass by us like a summer-cloud unheeded? forbid it every drop of English blood in every vein that does not proclaim its owner bastard. Will the gentlemen of England support or wink at such proceedings? They have a great stake in their country. They hold great estates, and they are bound in duty and in honour to consider them as retaining fees on the part of their country, for upholding its rights and liberties; surely they will at length awake and find they have other duties to perform besides fattening bullocks and planting cabbages. They never can stand tamely by as lookers-on whilst bloody Neres rip open their mother's womb. They must join the general voice, loudly demanding justice and redress, and head public meetings throughout the united kingdom, to put a stop in its commencement of a reign of terror and of blood, to afford consolation as far as it can be afforded, and legal redress to the widows and orphans and mutilated victims of this unparalleled and barbarous outrage. For this purpose I propose that a meeting should be called in Westminster, which the gentlemen of the committee will arrange, and whose summons I will hold myself in readiness to attend. Whether the penalty of our meeting will be death by military execution, I know not; but this I know, a man can die but once, and never better than in vindicating the laws and liberties of our country. Excuse this hasty address, I can scarcely tell what I have written. It may be a libel, or the attorney-general may call it so just as he

the county of Leicester. On the part of the prosecution it was proved, by Mr. Brookes, that the libel in question was delivered to him *by Mr. Bickersteth, on the 24th August; he did not state where, but I think it fair [*117 to presume that it was delivered at the place of his abode in Middlesex. Mr. Brooke's memory did not enable him to state distinctly the manner in which the paper came to his possession. He said that the envelope which had covered it was destroyed. He could not say whether it had an address on it or not; but, to the best of his recollection, it was addressed to Mr. Bickersteth. Where Mr. Bickersteth lived did not appear, nor who he was, further than that *he [*118 was the professional friend of Sir Francis Burdett. There was not any seal or trace of a seal on the envelope, nor was there any post-mark either on the envelope or paper. The paper was dated Kirby Park, August 22d; and it appeared in evidence that Kirby Park was in Leicestershire, but at no great distance from the boundaries of the counties of Leicester and Rutland. It also appeared, from the evidence of a toll-gate keeper near Kirby Park, that Sir Francis Burdett was seen in Leicestershire on the 22d August, and again on the following day. There was no evidence of his having left the county of Leicester till after the publication of the paper, which took place on the 25th August. The paper, to be ready for publication on the 25th, must have been sent from the defendant's seat in Leicestershire (which is nearly 100 miles from London) on the evening of the 23d (on which day the defendant was seen riding near the toll-gate), or the morning of the 24th. The only words that, according to Mr. Brookes's memory, were within the envelope, or any other part of the papers, besides the libel, were "*Forward this to Brookes.*" There was no express direction to him to publish it; and his only reason for thinking the defendant intended that it should be published was, that it was addressed to the electors of Westminster. It further appeared that Sir Francis Burdett, on Mr. Brookes being called upon by Lord Sidmouth to deliver up the author, wrote this letter: "Cottisbrook, August 28, My lord, hearing your lordship had applied to the gentleman through whose hands my address to the electors of Westminster was transmitted to the newspapers, to give up the author, and had, at the same time, intimated that a refusal would subject him, as well as the editors of the papers to a *ministerial prosecution; I take the liberty, in order to save your lordship further trouble, and also the gentleman above mentioned an [*119 unjust prosecution, to inform your lordship, that I am the author of the address in question; and, moreover, to assure your lordship, that although penned in a hurry, and under the influence of strongly excited feelings, I can discover nothing in it, on a reperusal, unbecoming the character of an honest man and an Englishman." At the close of the evidence on the part of the prosecution it was contended, that there was no evidence that the libel in question had been published in Leicestershire. After hearing the argument, I thought that there was not only such evidence of a publication in Leicestershire as I was bound to leave to the jury, but it appeared to me then, and appears to me now, that, unless it received an answer, it was cogent evidence for the jury to find the verdict which they have found. I stated shortly to the learned counsel, that my opinion was, that there was evidence to be laid before the jury, by which I meant them to understand that, if they thought proper, they might offer evi-

pleases. When the seven bishops were tried for libel, the army of James the Second, then encamped on Hounslow Heath, for supporting military power, gave three cheers on hearing of their acquittal. The king, startled at the noise, asked, 'What's that?' 'Nothing, sir,' was the answer, 'but the soldiers shouting at the acquittal of the seven bishops.' 'Do you call that nothing?' replied the misgiving tyrant, and shortly after abdicated the government. 'T^e true, James could not inflict the torture on his soldiers—could not tear the living flesh from their bones with a cat o' nine tails—could not flay them alive. Be this as it may, our duty is to meet, and 'England expects every man to do his duty.' I remain, gentlemen, most truly, and faithfully, your most obedient servant, F. Burdett, Kirby Park, August 22nd, 1819." In contempt of our said lord the king and his laws, to the evil example of all others, and against the peace of our said lord the king, his crown and dignity.

dence on the part of the defendant, to rebut the inference which the evidence on the part of the prosecution had raised of a publication in Leicestershire. No evidence was offered on the part of the defendant. The case was defended by the honourable baronet himself most ably—he said but little on the question of venue; but he contended that it was impossible to impute to him the intent charged in the information. I told the jury that there were two questions for their consideration. The first was, whether there was a publication of the libel in Leicestershire; and, secondly, if they should be of opinion that the paper was published in Leicestershire, whether the paper, "under the circumstances [120]" in which it was published, was a libel. I stated to them the evidence that had been given. I pointed out to them the opportunity the defendants had of answering the evidence for the prosecution by evidence which I thought he might have been prepared to offer. With respect to whether this was a libel, I told the jury, that the question, whether it was published with the intention alleged in the information, was peculiarly for their consideration; but I added, that the intention was to be collected from the paper itself, unless the import of the paper were explained by the mode of publication, or any other circumstances. I added, that if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to produce. I told them further, that if they should be of opinion that such was the intention of the defendant, then it was my duty to declare, that, in my opinion, such a paper, published with such an intent, was a libel; leaving it, however, to them (as I was aware at the time that I was bound to do under the act of parliament of the 32 Geo. 3, c. 60, s. 1,) to find whether it was a libel or not. The jury found the defendant guilty. A motion has been since made for a new trial, and I am extremely glad that this case has been fully discussed, and that the defendant has had the advantage of the ablest counsel whom the bar of this or any other country could afford. All that talent, industry, and learning could bring forward, has been urged by the gentlemen on each side. I hope, therefore, that we are enabled, by the assistance of the bar, to form an accurate judgment on this case.

Three objections were taken when the rule was moved. The first objection [121] is, that there was no evidence that *the libel was published in the county of Leicester. I have to observe on that point, that if there was any evidence, it was my duty to leave it to the jury, who alone could judge of its weight. The rule that governs a judge as to evidence, applies equally to the case offered on the part of the defendant, and that in support of the prosecution. It will hardly be contended, that if there was evidence offered on the part of the defendant, a judge would have a right to take on himself to decide on the effect of the evidence, and to withdraw it from the jury. Were a judge so to act, he might with great justice, be charged with usurping the privileges of the jury, and making a criminal trial, not what it is by our law, a trial by jury, but a trial by the judge. It must be borne in mind, that the question is not whether the evidence was such as ought to have satisfied a jury of the fact of publication in Leicestershire, but whether any facts were proved, which raised a presumption of publication in that county. If there were any such facts, I could not deal with them otherwise than I did. I am of opinion that there was evidence in this case, on the part of the prosecution, which raised a strong presumption, that the libel was published in Leicestershire; and no attempt having been made to rebut such presumption, it became, in my mind, conclusive proof of that fact. It has been said, that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not

proved, must have happened, we presume that it did "happen, as well [122
in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided, that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilized countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle. Lord MANSFIELD, in the *Douglas* case, gives the reason for this. "As it seldom happens that absolute certainty can be obtained in human affairs, therefore reason and public utility require that judges and all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side and on the other." In the highest crime known to the law, treason, you act upon presumption. On proof of rebellion, or the endeavour to excite rebellion, you presume an intent to kill the king. In homicide, upon proof of the fact of killing, you presume the malice necessary to constitute murder, and put it on the prisoner, by extracting facts in cross examination, or by direct testimony, to lower his offence to manslaughter, or justifiable homicide. In burglary and highway robbery, if a person is found in possession of the goods recently after the crime, you presume the possessor guilty, unless he can account for the possession. In the case of a libel, which is charged to be written with a particular intent, *if [123
the libel is calculated to produce the effect charged to be intended, you presume the intent. It therefore appears to me quite absurd, to state that we are not to act upon presumption. Until it pleases Providence to give us means beyond those our present faculties afford, of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is attempted to be raised, as to the *corpus delicti*, that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me in the most trifling cause that can be tried in Westminster hall. I shall now state why I think there was a ground raised for presuming that this libel was published in Leicestershire. If this presumption had not led us to the truth, it is quite clear it would have received an answer. The defendant came prepared to dispute the publication in Leicestershire. I must suppose he came armed with the means of doing so; he had nothing to do but to call Mr. Bickersteth, to prove where the paper first saw the light. If it was first delivered from the hand of the defendant in London or Middlesex, Mr. Bickersteth could have had no difficulty in proving the fact. It has been said, that the prosecutor ought to have called him. Did he know that such a person existed? Could he know that he had even touched this paper? Such knowledge could only have been obtained from Mr. Brookes, and he was not disposed to communicate it to the prosecutor. The law does not impose impossibilities on parties; it expects, that a man who has the means of knowing who may be witnesses, shall call them. The presumption is, that the "paper was delivered open in Leicestershire. In Phillipps on Evidence, p. 152, 4th edit., it is said that the civilians' definition of presumption is, "*Præsumptio nihil aliud est quam argumentum verisimile communi sensu perceptum ex eo quod plerumque fit aut fieri intelligitur.*" Presumption means nothing more than, as stated by Lord MANSFIELD, the weighing of probabilities, and deciding, by the powers of common sense, on which side the truth is. Now let us see what are the facts of this case, that raise the presumption of the paper having been delivered open in Leicestershire.

First, it is clear, that it was written in Leicestershire, for it was dated Kirby Park, Leicestershire ; and it was held, in the case of *The King v. Dr. Hensey*, 1 Burr. 644, that the date of a place in a letter, is evidence that it was written there. Then the next fact is, that on the 24th August the letter reached London. Now, Sir F. Burdett is proved, not only on the 22d but on the 23d August to have been in Leicestershire, not travelling to London, but riding out in the neighbourhood of his own house. It is clear, therefore, that it did not pass from his hands, in Middlesex, to those of Brookes, but from the hands of Bickersteth. This evidence, leaving Sir F. Burdett in Leicestershire, and showing a delivery by another person to Brookes, raises a presumption that it was sent by him, and not carried by him out of the county. If it was sent out of the county, in what state was it sent ? I am to presume a thing always in the state in which it is found, unless I have evidence that, at some previous time, it was in a different state. It was presented to Brookes open ; why then am I to presume it was ever inclosed ? If the envelope had had a *broken seal, I should have thought that evidence that it had been closed, and that Bickersteth, to whom Brookes thinks it was addressed, had opened it. But there was no trace of any seal having ever been attached to it. If it came in that envelope it must have been open ; and that it came in that envelope, is evident from the address to Bickersteth being on it. Brookes thought there was no post-mark on it. Do not all these facts show, that it was not sent by the post, but by some private hand (either that of Bickersteth, or some other person), and that the words on the outside of the envelope, and which Brookes thought was an address to Bickersteth, and the words in the inside, "*forward it to Brookes*," were only memoranda, as to what was to be done with the paper when it arrived in London. It has, to my mind, nothing of the appearance of a paper sent by the post. If sent by the post, why was it not franked direct to Mr. Brookes ? If it was thought right to submit it for the *first time* to Bickersteth, in London, for his opinion, the envelope would have contained something more of the form of a letter from one gentleman to another, than *forward this to Brookes*. If we act according to the rule laid down by Lord MANSFIELD and the civilians, to judge according to the weight of probabilities, we have then the highest degree of probability on the one side, without any thing to weigh against it on the other, that this paper was delivered either to Bickersteth, in Leicestershire, or to some other person in the confidence of the defendant ; and that he thought it right to trust it to such person open, that he might carry it to Bickersteth. On these grounds, I am of opinion that it was not only proper for me (according to the principles on which justice is administered) to leave this case to the jury in *the way I did, but that the jury could find no other verdict than that which they have found.

*126] But supposing it to have been sent by the post, my opinion is, that such a sending of it amounted to a publication. It is assumed that publication means a manifestation of the contents. I deny that such is the meaning of the word publication. In no part of the law do I find that it is used in that sense. A man publishes an award, but he does not read it. Again, he publishes a will, but he does not manifest its contents to those to whom he makes the publication ; he merely desires the witnesses to take notice, that the paper to which they affix their different attestations, is his will. So in the case of a libel, publication is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands, his control over it is gone ; he has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the locus punitio, his offence is complete, all that depends upon him is consummated, and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act. Suppose a man wraps up a newspaper and sends it into another county by a boy ; who is the publisher ? the boy who

perhaps cannot read or is ignorant of its contents, or the man who has put it up in the envelope? The boy who carries it is merely an innocent instrument; there can be no other publisher but the person who sent it, and who publishes it when he delivers it to the boy. If the sending of a letter by the post be not a publication in ^{the} county from whence it is sent, how is a libeller to be punished who sends his libel by the post to some foreign country for circulation? The libeller will not go to the foreign country that he may be punished there. If the *sending it from England be not a publication, (as it is contended at the bar,) can it be insisted, when the libel is completed by publication, [127] that such a libeller can nowhere be punished? A British subject might libel with impunity, in a foreign land, his sovereign, his government, or any distinguished individual whose fame extended beyond the limits of his own country; and the foreign disseminator would have this strong appeal to the mercy of his own laws, that being sent to him from a person in England he believed the libel to be true. But there is authority for saying that this is a publication. In the case of *The King v. Watson* it was contended, that the post-mark was proof of the letter having been put into the post at Islington, and that such putting into the post amounted to a publication. Lord ELLENBOROUGH held the proof of the publication of the letter insufficient. Why? because there was no proof that there was the post-mark, and that what appeared to be the post-mark might have been a forgery. Now, he would not have said so, if he had thought that putting the letter into the post-office at Islington did not amount to a publication. If he had said the putting the letter into the post was not a publication, he would have been inconsistent with himself, a circumstance which the soundness of his judgment would have prevented. For in the case of *The King v. Williams*, which was for sending a challenge in a letter, Lord ELLENBOROUGH said there was a publication in Middlesex by putting it into the post-office there, with intent that it should be delivered at Windsor. Lord ELLENBOROUGH does not say that this is a sufficient *sending* of a challenge, but a sufficient publication; nor can there be any difference between that case and any other libel. Why are libels against individuals *prosecuted? because they have a tendency to provoke the party, to whom they are sent, to a breach of [128] the peace. There can be no distinction between a libel sent with an express intent to provoke a breach of the peace, and any other libel on an individual. This case is directly in point to prove that the putting of a letter into the post is a sufficient publication. Had not the civil law been quoted by the counsel for the defendant, I should not have referred to it, although I think it strongly confirmatory of my opinion. The description of a libeller in our indictments seems to me to have been borrowed from the civil law, and I agree that their word *edere* is represented by our word *publish*; but I deny that *edere* means to manifest the contents of a paper. Both in the Roman classics and law books it means the act of *delivery*, which precedes the manifestation of the contents; and the subsequent manifestation is expressed by some other term, as *exponere* or *manifestare*. Thus, in Cicero, *De Legibus*, lib. 3, art. 20, he says, "apud eosdem qui magistratus abierint *edant et exponant* quid in magistratu gesserint." Here, the word "*edant*" means "they uttered," and the word "*exponant*," "they exposed to public view what was so uttered." So, in the civil law, in the Codex, lib. 9, tit. 36, we have this passage: "Si quis famosum libellum ignarus repererit, aut corrumpat priusquam alter inveniat aut nulli confiteatur inventum. Si vero non statim easdem chartulas corruperit vel igne consumpsert, sed earum vim manifestaverit sciat se ut auctorem hujusmodi delicti capitali sententiae subjugandum." Here, the word *ediderit* is not used, but *manifestaverit*. Why? because it constituted no crime for a person who found a paper, and, being ignorant of its contents, delivered it to another. To punish him with death *would have been a species of cruelty of which the worst of the Romans were incapable; but if, instead of destroying it, [129]

he manifested it, then he was to be considered as the author. The reason I quote this passage is to show that where "ediderit" is used, it means a delivery only; but when they intend to express a disclosure of the contents of a paper, they use the word *manifestaverit*; and thus, both according to the civil and the English law, whether this paper were delivered open or wrapped up in a hundred envelopes, the delivery was a publication.(a)

*130] I come now to another point, viz. the rejection of the evidence of that which was done at Manchester, which it was contended ought to have been received for the purpose of explaining the libel. Now in the first place there was no ambiguity to explain. There was no part of the libel that was not intelligible without the aid of evidence. In the next place, it was clear that notwithstanding any thing which might have passed at Manchester, many parts of this letter were libellous. Nothing that passed there could explain the allusion to the commencement of a reign of blood and terror in this country, or have applied to what is said in the libel of the soldiers having the living flesh torn from their bones; or to what is perhaps the strongest part of it, the allusion to the abduction of King James. The paper would, therefore, at all events, have remained a highly aggravated libel. It is not like the case of *The King v. Horne*. There the defendant did not insist on the truth of the libel, but the indictment having charged him with libelling the king's troops, he endeavoured to show that those whom he had libelled were not the king's troops; the evidence was admitted only to remove an ambiguity, but there is no obscurity like that in the present case. The defendant in that case offered the evidence, but it failed; and Lord MANSFIELD said, that from the evidence he produced, it appeared clearly that they were the king's troops; his words are, "in this case the defendant gave evidence, but demonstrated that the libel related to the troops acting under the king's authority."

*131] Another point on which the motion for a new trial was made was, that I took upon myself to lay down the law to the jury as to the libel, and that since the statute 32 Geo. 3, c. 80, I was not warranted in so doing. I told the jury that they were to consider whether the paper was published with the intent charged in the information; and that if they thought it was

(a) We would venture with great deference to the learned judge, to suggest that possibly it may be found on examination that the word *edo* is not unfrequently used by the best writers to express a publication in the popular sense of the word. Quintilian, iii. 7, speaking of Cicero's publications, uses the phrase, *Editi in competitore, in L. Pisonem, et Clodium, et Curiensem libri vituperationem continent*. And Cicero himself, in various passages, has employed the same expression in the same sense. As for instance: *Scripsi etiam versibus tres libros de temporibus meis, quos jam pridem ad te misissem, si esse edendos putarem*. Epist. ad Fam. Lib. i. 9. *Nec se tenuit quin contra doctores librum etiam ederet*. Acad. Quest. iv. 12. *Non occultavi (tabulas) non continuo domi; sed descripsi ab omnibus statim librarius, dividii passim, et perulgari et edi Populo Romane, imperavi*. Pro. Syll. 15. *Ut annales senex emendam atque edam*. Ad Atticum, ii. 16. *Legem autem a me edentur non perfecte*. De Legibus, ii. 18. There is another passage which shows this use of the word in a strong light. It is well known that Cn. Flavius first made public the "actiones" of the lawyers, which, till then, had been kept secret by them. And Cicero thus alludes to it, *Augendae potentiae sunt causa perulgari artem suam noluerunt: deinde posteaquam est editum expositis a Cn. Flavio primum actionibus, &c*. De Oratore, i. 41. In the books of the civil law, the definition of the word edere is Copiam describendi facere, in libello complecti et dare, vel dictere; which refers to the custom of the plaintiff inscribing in the book of the prator, his cause of complaint against the defendant, and afterwards of serving his declaration upon the opposite party. Budzeus inquit "edere" apud juris-consulitos est, quod nunc, per scriptum dare, vel per declarationem, dicunt. These authorities show, that amongst the Roman writers, the words *edo*, when applied to books, annals, and the like, meant "to make public." And amongst the civilians, even in its technical use, it implied a particular mode of making public, prescribed by the law, viz. by the inscription in the prator's book. It undoubtedly also included the delivery of the declaration to the opposite party, which possibly may account for its being apparently used sometimes in the more restricted sense. In the passage from Cicero, quoted by the learned judge, it should be observed, that the words "edant et exponent," are not applied to any book or written composition, and in that case the word may probably admit of a different interpretation to the one here suggested. See Stephanus Thesaurus Linguae Latine; and Vicat. Vocabularium Utriusque Juris.

published with that intent, I was of opinion that it was a libel. I, however, added, that they were to decide whether they would adopt my opinion. In forming their opinion on the question of libel, I told the jury that they were to consider whether the paper contained a sober address to the reason of mankind, or whether it was an appeal to their passions, calculated to incite them to acts of violence and outrage. If it was of the former description, it was not a libel; if of the latter description, it was. It must not be supposed that the statute of George the Third made the question of libel a question of fact. If it had, instead of removing an anomaly, it would have created one. Libel is a question of law, and the judge is the judge of the law in libel as in all other cases, the jury having the power of acting agreeably to his statement of the law or not. All that the statute does is to prevent the question from being left to the jury in the narrow way in which it was left before that time. The jury were then only to find the fact of the publication, and the truth of the innuendoes; for the judges used to tell them that the intent was an inference of law, to be drawn from the paper, with which the jury had nothing to do. The legislature has said that that is not so, but that the whole case is to be left to the jury. But judges are in express terms directed to lay down the law *as in other cases*. In all cases the jury may find a general verdict; they do so in cases of murder and treason, but there the *judge tells them what is the law, though they may find [132] against him, unless they are satisfied with his opinion. And this is plain from the words of the statute, which, after reciting that doubts had arisen whether on the trial of a libel the jury may give their verdict on the whole matter in issue, directs that "they shall not be required or directed by the judge to find the defendant guilty merely on the proof of the publication, and the sense ascribed to it by the indictment." But the statute proceeds expressly to say, that "on every such trial the judge shall, according to his discretion, give his opinion to the jury on the matter, in like manner as in other criminal cases." That was all that was done on this occasion, and, therefore, I am of opinion that this objection also fails. As to the libel itself, considering it as the production of a man of large fortune, high rank, and extensive influence, where is the person that can make an observation in favour of any part of it? My opinion of the liberty of the press is, that every man ought to be permitted to instruct his fellow subjects; that every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country; that he may point out errors in the measures of public men, but he must not impute criminal conduct to them. The liberty of the press cannot be carried to this extent without violating another equally sacred right; namely, the right of character. This right can only be attacked in a court of justice, where the party attacked has a fair opportunity of defending himself. Where vituperation begins, the liberty of the press ends. This maxim was acted upon by the greatest states of antiquity. In our country, the liberty of the press allows us to persuade men to use their constitutional influence over their *representatives to obtain in the regular parliamentary manner a redress of real or supposed grievances. But this must be [133] done with temper and moderation, otherwise instead of setting the government in motion for the people, the people may be set in motion against the government. In such a case as this it is fit that the public should know the grounds on which I have acted. Whether I shall persuade others that I have acted right I know not. It is enough for me as an Englishman, to be myself satisfied that I have done so. We have been desired to consider what posterity will think of our judgment. I am not insensible to this consideration, but I value only the good opinion of those who love their country and wish to preserve it in peace. Of their censure I am not afraid. I have acted upon this occasion with the firmness which the times in which we live particularly require, but I trust

I have not lost sight of that which ought in all times to guide a judge in this country, where every magistrate is reminded by the oath of his sovereign, that it is his first duty to administer justice in mercy.

HOLROYD, J. This is a motion for a new trial which has been made and supported in argument on various grounds with the greatest ability ; but after hearing and most attentively considering every thing that has been suggested by the learning and ingenuity which on this occasion we have heard displayed, and the authorities that have been relied upon or discussed, I am of opinion, that the rule for a new trial ought not to be made absolute. The case appears to me to have been sufficiently proved at the trial to warrant the verdict given against the defendant. The proofs are direct and positive, not only that the paper writing, charged to be a "libel was published, but also that Sir Francis Burdett was the author of it ; that the same was in fact not only composed and written, but that it was also published, by him. I am not at present speaking of any proof either positive or presumptive, of an act of publication by him in Leicestershire. I am now speaking of the proof merely of an act of publication by him somewhere. That he was not only the composer and writer, but also that he published it, is directly proved by evidence of his hand-writing to the libel and its envelope, and by the contents of that envelope directing Mr. Bickersteth to pass it to Mr. Brookes, and further by his letter to Lord Sidmouth, in which he not only expressly acknowledges himself to be the author of the paper writing charged to be a libel, but the fact also of *his having sometime before sent it up to town*. So that it is established by direct proof, not only that the paper writing in question was composed and written by him, but also that the locus pœnitentie of the writer was passed by his having parted with the possession of it. His own act of sending away the letter, his publishing it to Mr. Bickersteth, and the publication of it to Mr. Brookes by his own direct authority and order, are decisive on this point. But, if necessary, we have, in addition to the positive proofs of a complete corpus delicti having been committed by the defendant somewhere, by his writing and publishing the letter in question, pregnant proofs, afforded by the very contents of the letter itself, that it was originally composed not with a view of keeping it for any time to himself, for any further consideration whether it should be published or suppressed, but with the intent that it should speedily be published and acted upon. For from its being addressed to the electors of Westminster, and from the haste in which it appears to have been written, evidently for the purpose of dispatch, it is clear that the defendant intended that it should be acted upon by others in the speedy call of public meetings on the subject. So that the proofs are not only of a writing and publishing by the defendant, but also that the letter was originally written by him with the intent, and for the purpose of its being published, and that that was the sole cause and object of its being written. That it was written at Kirby Park in Leicestershire, is proved, and indeed is admitted to have been proved by its date. And upon this part of the case the *King v. Hensey*, which was cited, is an authority in point. These circumstances, all of which were proved or admitted at the trial, being taken into consideration, it appears to me, that the jury of the county of Leicester had a jurisdiction by law over the offence with which the defendant was charged.

Writing a libel with the intent and for the purpose of its being published (under circumstances not sufficient in law to justify or excuse the writer for so doing,) followed by a publication by the act, or under the authority of the writer, is in my opinion, by the law of England, a misdemeanor, and triable in the county where such writing took place, though the publication be in some other county. I do not say whether all those qualities are or are not necessary to be attached to or connected with the act of writing, in order to make it a misdemeanor. It is not necessary at present to consider or give any opinion

upon any such case, and still less upon a case where the writing remains confined by the author to his own closet or privacy, or has been obtained from thence, and published without his privity or consent. *How far the case of the *King v. Beare*, may be borne out or supported in law to [136 that extent, I have not in the present case considered, nor do I mean now to give my opinion upon it. The present case, I think, does not require it, being quite distinguishable; and every thing said by me in this case, will, as I conceive, leave my judgment, as well as that of others, quite unfettered in any such cases as I have last supposed, if unfortunately any such should arise. Where a misdemeanor has been committed by a defendant *by writing and publishing* a libel, the *writing* of such a libel so published, is in my opinion criminal, and liable to be punished by the law of England as a misdemeanor, as well as the publishing of it. The crime in such a case is not confined to the publishing of it alone. The constant form in which the charge is alleged in indictments and informations, shows this. Where the facts of the case are expected to support it, the indictment or information does not confine the offence charged to publishing the libel merely, but alleges the composing or the writing of it *as part of the crime*; and where the party prosecuted has been acquitted of publishing it, and found guilty of writing it, judgment has passed against the defendants, not merely in the *King v. Beare*, but in the subsequent cases of the *King v. Knell*, and the *King v. Carter*, for the preceding parts which the several defendants had taken with respect to the libel, whether it were in printing, composing, or writing them. The charge against this defendant is an aggregate offence; a misdemeanor consisting of different parts, viz. the composing, writing, and publishing; and if so much of that charge be proved to have been committed in the county of Leicester, *as is in law a misdemeanor*, it is perfectly *clear that he might be found guilty of that part alone, [137 and that judgment thereupon must pass against him pro tanto. The composing and writing, with the intent and for the purpose above stated, of a libel proved to have been published by the defendant, is in my opinion, of itself a misdemeanor, in whatever county the publishing of it took place, and is, I think, triable in the county where the libel was composed and written. The jury of that county, I take it to be clear, may inquire into any fact, though in another county, so far at least as tends to prove that to be an offence which has been done in their own county. So far, therefore, at least as the defendant's publishing the libel elsewhere, tends to prove his *composing and writing* of it to be criminal, the jury of the county where it was composed and written, clearly, I think, may inquire of, and take cognizance of it. This is constantly done in the case of overt acts of high treason, and of acts of conspiracy, committed out of the county, in order to establish or confirm the charge of treason or conspiracy within the county.

But it is urged, that if the defendant were found guilty of the composing and writing, and not of the publishing, this information does not contain a sufficient charge of composing and writing, so as to make composing and writing in that case criminal, inasmuch as it does not allege that the defendant wrote it *with intent to publish it*. Now, without considering how far an information in such a case would or would not be sufficient to convict the writer upon it, unless such an allegation, either directly or to that effect, were contained in it, the information does in this case, I think, contain an allegation, not only to that extent and effect, but even *further: for it alleges that the defendant, intending to [138 excite discontent and sedition amongst the king's subjects, and particularly amongst the soldiers, &c. &c., composed, wrote, and published the libel. This allegation of the intent is applicable to each of the acts charged upon the defendant: to the composing and writing, as well as the publishing. And, therefore, as such discontent and sedition could not be excited amongst the soldiers of the king without publishing the libel, the information in effect alleges that

the defendant composed and wrote it for the purpose of its being published, in order to effect those further purposes of mischief which could not be accomplished by it, unless by its publication.

But further, I think the jury may inquire into, and take cognisance of those facts which are done out of their county, for the purpose of finding a defendant guilty, not only of so much of the crime as was committed within the county, but also of the remainder of the aggregate charge, in those cases, where so much of the misdemeanor charged as is proved to have been done within their county, is of itself a misdemeanor. If that be so, it would warrant this verdict in its full extent, whether the publication of this libel is deemed to have been in the county of Leicester or not. And this is established to be the law, in the cases of conspiracies and nuisances, in both of which the juries do not confine their verdicts of guilty to such criminal acts or consequences as occur in the county where the conspiracy or erection of the nuisance is laid and proved, but extend them to such further acts and consequences of conspiracy and nuisance, as may occur or arise in another county ; and judgment and punishment are in

*139] *such cases given and awarded to the full extent of the aggregate offence. The cases of felony have been urged as bearing on the present case, particularly those provided for by the statute of Philip and Mary, but those are, I think, distinguished from, and do not apply to the present question.

It has, however, been further urged, that there ought to be a new trial, because the verdict was found upon the learned judge's telling the jury that there was evidence before them to show that the libel was published by the defendant in Leicestershire ; that it might be presumed to have been delivered by the defendant to Mr. Bickersteth there, and even in the state in which it was afterwards delivered to Mr. Brookes, namely, open. From what I have stated above, it appears that my opinion must be, that by law the learned judge need not have gone so far in favour of the defendant as to put it to the jury to consider whether, from the evidence given, they would presume and find that the defendant had published the libel in Leicestershire, which would have given him the benefit of an acquittal, in case they had thought the evidence not sufficient for them to make that presumption ; because, for the reasons I have above stated, I think the verdict ought to have been the same whether the defendant had published the libel in that or any other county. It is certainly true, and I most ardently hope that it will ever continue to be the case, that by the law of England, as it was urged and admitted in the case of the Seven Bishops, no man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably, or reasonably, from the facts proved, cannot avail in law. That is the presumption spoken

*140] *of in the Seven Bishops' case, which is no more than mere loose conjecture, without sufficient premises really to warrant the conclusion. But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved, upon presumptive evidence only of the guilt of the party accused ; and the well-being and security of society much depend upon the receiving and giving due effect to such proofs. The presumptions arising from these proofs should, no doubt, and most especially in crimes of great magnitude, be duly and carefully weighed. They stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger according as the party has, or is reasonably to be supposed to have it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true ; and according as he does or does not produce such contrary evidence. It is established as a general rule of evidence, that in every case the onus probandi lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cog-

nisant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true. Bearing these considerations *in remembrance, there was, I think, evidence sufficient to be left to the [141] jury from which they might reasonably presume a publication by the defendant in Leicestershire. In the case of Sir Manasseh Lopez, for bribing a voter of a borough in Cornwall; evidence was given that when he was at his seat in Devonshire he said, "such a one," (the person whom he was charged to have bribed, and whom he was proved to have bribed, though it did not appear whether the bribery was committed in the county of Devon,) "has been with me." It was objected at the trial, that there was not evidence sufficient to show that the offence was committed in Devonshire. Upon that occasion I left it to the jury to consider whether his being there at the time, and that being the county in which the voter was to vote, were not sufficient; and upon that evidence the jury presumed the offence to have been committed in Devonshire; it being in the defendant's power, by means of the voter, who was, however, not called by him, to have shown that the crime was committed out of Devonshire, if the fact had been so. I mentioned this circumstance to the court afterwards, in order that it might be ascertained whether he was rightly convicted or not, and the court thought it was *prima facie* evidence, and he received judgment.

The presumptions in the present case, are stronger, and arise, as well from the contents of the libel, and the extrinsic facts proved, as from the want of contrary evidence within the knowledge and power of the defendant, as to facts peculiarly within his own knowledge, and of which he must be supposed cognisant, in order to rebut or weaken those presumptions against him. The contents of the libel show, that it was written in haste, *and in Leicestershire, for the purpose of being speedily acted upon by public meetings [142] elsewhere; from which it is reasonably to be presumed to have been, as soon as effectually it might be, sent off for its destination, as it must have been delivered by Mr. Bickersteth to Mr. Brookes, in Middlesex, on the 24th August, or otherwise it could not have been published in the British Press on the 25th. The writer was living in Leicestershire, and was proved to be there on the 22d and the day following, within which period of time it was, probably, sent away; and it is but a reasonable presumption, that it was sent away by him from the place where he was then living; at least it is so, in default of proof, on his part, of his being out of the county, or of any other evidence to rebut that presumption. The evidence for the crown established both the time and person to whom the prosecutor had traced the libel. How it came to Mr. Brookes unsealed, and whether it was originally sealed or not, were matters peculiarly in the knowledge of the defendant, and not of the prosecutor. He knew how and in what state, whether open or sealed, and when he had sent or delivered it to Mr. Bickersteth, and might have proved it, or at least he might have shown, by Mr. Bickersteth, in what state it was when he received it. Of these facts the prosecutor could not be supposed to be cognisant; nor can it be supposed, if the letter had not been parted with by the defendant in Leicestershire, and even in an unsealed state, (for it does not appear, that is, there is no proof, that it went by the post; and if it did, it would no doubt go sealed,) that Mr. Bickersteth would not have been called by the defendant to prove the state in which it was received by him. In default of all proof, under such circumstances, to weaken *or rebut these presumptions, I think the jury were warranted in concluding and finding that it was parted with by the defendant in Leices- [143]

tershire, and that it was then in the same state in which it was delivered to Mr. Brookes, there being no proof, either direct or presumptive, of its ever having been in any other state. Indeed, my belief, from the evidence, would be, that it was not sent by the post to Mr. Bickersteth, and that he was not in London when he received it, but that probably, it was delivered to him by the defendant in Leicestershire ; for I cannot suggest to myself any reason for his sending the libel, either by the post or otherwise, to Mr. Bickersteth, merely to give him the trouble of passing it to Mr. Brookes in the Strand, instead of sending it at once to Mr. Brookes himself.

But whether it was sent away or parted with by the defendant in Leicestershire, *open or sealed*, makes, in my opinion, no difference with respect to the question, whether it was, in point of law, published by him in that county or not, so far as to give the jury of that county jurisdiction over that fact. In 5 Co. Rep. 126 a, it is laid down, that a scandalous libel may be published, traditio[n]e, *when* the libel, or any copy of it, is *delivered* over to scandalize the party. So that the mere delivering over or parting with the libel with that intent, is deemed a publishing. It is an uttering of the libel, and that I take to be the sense in which the word *publishing* is used in law. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only is, indisputably, in law, a publishing. Lord C. J. DE GREY, in *Baldwin v. Elphinston*, 2 Black. Rep. 1037, states, that a written libel may be published in a letter *to a third person, and states *144] two instances from Rastal's entries, *Action on case*, 13 a, of charges of constructive publications, by delivering letters to A. and B., and by fixing them on the door of St. Paul's church. The mere delivery or fixing them, with the intent to scandalize, is itself considered to be a publishing ; and in prosecutions for libels, it is never made a matter of inquiry, whether either the witness, who purchased the libel at a defendant's shop, or any other person, read it in the county where it was bought, or even at all, in order to prove the publication of it complete in that county. In such cases the fact of delivering it to the purchaser is alone relied upon as proof of the publication in the county, without any proof of its being read there or elsewhere. In the prosecutions for libels in London, when proof was given of their being purchased at Carlisle's shop, in Fleet-street, no inquiry, I believe, ever followed, whether the purchaser had read them within the city of London or not; though there is all probability he took them out of the city of London and delivered them unread to the solicitor of the treasury, or some one else in Lincoln's Inn. The mere parting with a libel with such an intent, by which a defendant loses his power of control over it, is an uttering ; and when the contents of it have thereby become known, if not before, it has become, I think, so far a criminal act, in the county where it is parted with, as to give the jury there a jurisdiction to try the crime of publishing it. As far as depends on the defendant, his crime is there complete ; and the act of another person, in reading the composition elsewhere, does not alter his criminality, or the nature of his act, in the county where he parted with it with the *145] criminal intent. In the cases of *wills and awards, they are constantly made and published, without the contents being made known, even to the witnesses in whose presence they are published. So that the making known the contents is not, in some cases at least, *ex vi termini*, essential to the constitution of an act of publishing.

With respect to the objection of the learned judge's refusing to receive evidence of the truth of the facts alleged, or rather assumed in the libel, there is, I think, not the least doubt upon the point. Although the objection was made, it was not even attempted to be supported by argument at the trial. Whatever might be the result of a due inquiry into those facts elsewhere, it is clear that that was not the proper place or occasion for inquiring into them, nor would

the writing be otherwise than, in law, a libel. It assumes, as true, a statement most highly calumnious on individuals, and on the government, merely from a statement in a public newspaper, and without the knowledge, whether it were true or not, to any or to what extent, and indulges in the highest strain of invective, for the purpose of inflaming the public, and raising in their minds the greatest discontent, disaffection, and alarm. That is, in itself, a seditious libel, and the question for the jury was, whether what the defendant had written and published, with the intent stated in the information, was a libel or not, and not to what extent it was so; even supposing that the result of that inquiry would have been any palliation of the libel. With respect to the objections taken to the learned judge's having given his opinion and directions to the jury, upon the question, whether the writing was a libel or not, it seems to me that he left it to them to consider, whether they would adopt his opinion in that respect, or not; and he is expressly directed, by the statute of the 32d of the late king, according to his discretion, to give his opinion and directions to the jury on the matter in issue, in like manner as in other criminal cases. And with respect to the objections to his summing up, I do not, upon an attentive consideration of it, find any reason to disagree with his observations in that respect. For these reasons, I think the rule for a new trial ought to be discharged.

BAYLEY, J. In several of the points discussed in the course of the argument, I agree with the rest of the court. I have not the least doubt that the evidence relative to the truth of the transactions, stated in the libel to have taken place at Manchester, was properly rejected. I take it to be clear law, that if a libel contain matters imputing to another a crime capable of being tried, you are not at liberty at the time of the trial of the libel, to give evidence of the truth of those imputations. And this is founded on a wise, wholesome, and merciful rule of law; for if a party has committed such an offence, he ought to be brought to trial fairly, and without any prejudice previously raised in the minds of the public and the jury. The proper course, therefore, is to institute direct proceedings against him, and not to try the truth of his guilt or innocence behind his back, in a collateral issue to which he is no party. The present libel contains imputations of very high crimes, capable of being tried. It contains a statement that certain persons at Manchester had been guilty of murder, and the truth, therefore, of the libel could not be tried without inquiring whether at Manchester certain persons had or had not committed murder. It appears, therefore, to me, that evidence upon this point ^{*was} not admissible; and that the case of *Rex v. Horne* is distinguishable, on the ground that there was not in that case an imputation of any crime capable of being tried. In some cases, indeed, it is possible that the falsehood may be of the very essence of the libel. As for instance; suppose a paper were to state that A. was on a given day tried at a given place and convicted of perjury: if that be true, it may be no libel, but if false, it is from beginning to end calumnious, and may, no doubt, be the subject of a criminal prosecution. Possibly, therefore, in such a case, evidence of the truth of such a statement by the production of the record, might afford an answer to a prosecution for libel. I also entirely agree that the learned judge did right in intimating to the jury his opinion on the question, whether this was or was not a libel, and in telling them that they were to take the law from him, unless they were satisfied he was wrong. The old rule of law is, *ad questionem juris respondentes judices, ad questionem facti respondentes juratores*; and I take it to be the bounden duty of the judge to lay down the law as it strikes him, and that of the jury to accede to it, unless they have superior knowledge on the subject: and the direction in this case did not take away from the jury the power of acting on their own judgment. Besides, if the judge be mistaken in his view of the law, his mistake may be set right by a motion for a new trial; but if the jury are wrong in their view of it, it is not so easy to

rectify their mistake. Upon all these several points I agree with the rest of the court.

But the difficulty which has pressed on my mind, and which, from the beginning of this argument to the conclusion, I have not been able to overcome, arises from *the direction of the learned judge to the jury, as to the publication in the county of Leicester. This is, undoubtedly, a technical objection, and does not interfere with the merits of the case. But whether technical or not, it seems to me to be a valid objection ; and I should desert my duty if I did not, by avowing my opinion, give to the defendant the full benefit which may arise from it, whatever that opinion may be. The facts proved at the trial were in substance these : the libel was written at Kirby Park, in Leicestershire ; appeared from the date, which is Kirby Park, the 22d August, and from the circumstance of the defendant being seen on that and the subsequent day, riding near his residence in that county. By a subsequent letter to Lord Sidmouth, the defendant avowed himself the author, and that he had transmitted the paper to London. It appeared also, that on the 24th of August Mr. Brookes received it in London from Mr. Bickersteth, and that he received at the same time an envelope, in which the libel was contained, and in which was a direction from the defendant to Mr. Bickersteth, to pass the inclosure to Mr. Brookes. It did not appear whether the envelope had been sealed, and there was no evidence of the manner in which it had reached Mr. Bickersteth, whether by a personal delivery or otherwise ; he himself was not called as a witness, nor was there any evidence to show that he was resident or had been in Leicestershire about that time. An objection was taken at the trial, that there was no evidence of any publication in Leicestershire, which, after argument, the learned judge overruled, and when he summed up to the jury, he intimated to them, that they might presume that the inclosed paper was delivered open to Mr. Bickersteth, in the county of Leicester. Now, my objection to *that direction is this, that the judge left it to the jury without sufficient premises to warrant them in presuming an open delivery to Mr. Bickersteth ; and that it proposed to their consideration no other species of delivery by the defendant. As far as I can judge, the evidence given furnished to them no ground for such a presumption. No one can doubt that presumptions may be made in criminal as well as in civil cases. It is constantly the practice to act upon them, and I apprehend that more than one half of the persons convicted of crimes, are convicted on presumptive evidence. If a theft has been committed, and shortly afterwards, the property is found in the possession of a person who can give no account of it, it is presumed that he is the thief, and so, in other criminal cases ; but the question always is, whether there are sufficient premises to warrant the presumption, and those premises seem to me, in this case, to be wanting. In order to warrant a presumption a *prima facie* case must, at least, be made out. Now was such a *prima facie* case made out here ? The proposition to be established consists of two parts : first, that a paper, written in Leicestershire and afterwards found in London, in the hands of Mr. Bickersteth, was delivered personally to him in Leicestershire ; and, secondly, that it was delivered to him open. It is incumbent on the prosecutor to make out a *prima facie* case upon the affirmative of each of those points. Now, does he advance any evidence as to either ? Does it follow, that because Mr. Bickersteth has it in London, that he received it personally in Leicestershire ? Does it follow, because he has it open in London, that it was not sent to him in a parcel or in a sealed letter ? Suppose this to be the only proposition to be established, and that *the prosecutor had gone with this evidence before a grand jury, could the grand jury have found the bill ? I apprehend they would have expected some additional facts to be produced, and that unless Mr. Bickersteth had been called as a witness on the part of the crown, they would not have found a bill on the publication in Leicestershire ; they might have said, "Here

is clearly a publication in Middlesex, for which a bill will no doubt be found by the grand jury of that county; but it is altogether doubtful whether any publication took place in Leicestershire, or not." Now, if a grand jury could not find a bill upon such evidence, can the petit jury be asked to convict upon it? Again, suppose a feigned issue upon these two questions; could the plaintiff ask for a verdict upon such evidence as this? Upon whom does the onus probandi lie? Is the plaintiff to say to the jury, "if the defendant does not give you any evidence you are to presume that this paper was delivered to Mr. Bickersteth and open?" I apprehend, that if he did say so, it would be impossible for the jury to come to such a conclusion. I try this case by these tests, because, although this is a criminal information filed by the attorney-general, yet he will not file an information in any particular county, unless he is convinced that there is such evidence as ought to satisfy a grand jury; and he never would, I apprehend, have filed this information, unless he had thought that there was a *prima facie* case of publication in Leicestershire. I agree, that where a matter is peculiarly within the knowledge of one party, the onus probandi may be shifted, and his neglect to give the evidence may furnish ground for a presumption against him. But here the matter does not lie *peculiarly within the knowledge of the defendant. Mr. Bickersteth knew [151] as well as the defendant the circumstances of the case, and the case on the part of the prosecution shows it. Then the question is, whether it was sufficient to leave the case without calling him as a witness. Is the prosecutor to say, "Here is a person who can tell you to an absolute certainty the fact as to the delivery, but I will not call him, and yet I will desire you to presume a personal and open delivery to him. I ask you to act upon presumption which may mislead, when the power of supplying you with certainty is within my reach." If, indeed, there was any evidence to go to the jury, they had a right to come to a conclusion. But my opinion is, that there was no evidence, and that it ought not to have been submitted to their consideration at all. My learned brother told the jury most properly, that if he were wrong in his view of the case, the defendant would have the benefit of having his mistake corrected. And it does seem to me upon a careful review of the case, that there was a mistake in considering that in the absence of Mr. Bickersteth, there was any evidence to go to the jury. If, in the course of the cause, it had appeared that Mr. Bickersteth had been in Leicestershire, or that the defendant or any of his agents had been instrumental in concealing from the prosecution the mode in which the paper had come to the hands of Mr. Brookes, it might, perhaps, have varied the case, and given some ground for such a presumption. But there is no such proof, nor even that any application to that effect was ever made to Mr. Brookes; it is not even shown that Mr. Bickersteth was not present in court at the time of the trial, and capable of being examined as a witness. In the absence of all this proof, it seems to me that there was no ground on which the jury could *put the presumption either the one way or the other. If this case had gone before a grand jury, Mr. Brookes might [152] have been compelled to say from whom he received the paper, and the link of the chain which seems at present wanting, might have been easily filled up. But it seems to me that as the case at present stands, the jury were desired to make a presumption without having sufficient premises, and that if they did draw that presumption they acted not upon justifiable inference, but upon unwarrantable conjecture. Upon these grounds the difficulty which I have entertained in this case is principally founded.

But it is said, that even if the verdict cannot be supported on this ground, yet there is evidence from which a jury might have presumed, and must have presumed, that this libel was delivered for the purpose of publication, either to a servant, or at the post-office, in the county of Leicester. If the jury *must have presumed that*, I should pause before I said there ought to be a new trial. If

it stands only that they might have done so, then it is for them to draw the conclusion. If the case has been put to them on a ground which cannot be supported, we must use great caution in proceeding upon the idea that there was another ground on which they might have acted. The jury ought never to invade the province of the judge as to questions of law, but it is for them alone to come to a conclusion on questions of fact. If the court draw the conclusion, they invade the province of the jury. Upon this evidence, I cannot tell where Sir Francis Burdett parted with the letter, what distance his residence is from the post-office, into what post-office it was put, and whether he carried it himself, or sent it by a servant. These are points on which I have no means of forming a judgment. It therefore *seems to me that there is no foundation on which without infringing on the rights and privileges of the jury, we could come to the conclusion, that although the paper was delivered to Mr. Brookes, in London, it must have been parted with by Sir Francis Burdett in Leicestershire. That question has not been put to the jury, and till that has taken place, it is not for me to put such a construction upon the facts. But suppose that it was delivered by Sir Francis Burdett in Leicestershire; then the question arises, in what state was it delivered? Was it open or sealed? If sealed, does a close delivery amount in law to a publication? That turns on the meaning of the word publication; I do not mean to give an opinion whether a close delivery is or is not a publication, but I think, that if a judge tells a jury that a close delivery, a mere traditio, in a sealed state (without an opportunity of seeing the contents) is a publication, a defendant should have the right to claim a special verdict on that point, in order that he may have the opinion of a court of error on the subject. The word "published," is equivocal, and may admit of different meanings according to the subject-matter to which it is applied. In the case of libel, which is criminal only in respect of its contents, it may mean only a communication to others, or an affording an opportunity to others of seeing the contents. There does not appear to me to be any authority so direct on this point as to take from the defendant the right to have a writ of error in order to canvass this question. Of the authority of Lord ELLENBOROUGH, nobody thinks higher than I do. He was a man of a most powerful and vigorous mind; but I may say, that even his opinions at nisi prius were not always right; and I will add of him, *154] that I never met with a man who was more ready in the best *part of his life to recede from his own opinion so delivered, and to yield to that of others. The case of *The King v. Watson* did not give him such an opportunity. The evidence was of the post-mark at Islington, to show a publication in Middlesex; the case subsequently failed, and the point was not afterwards considered. The case of *The King v. Williams*, was for sending a challenge, and though the word publication was used, yet the act charged was an act of sending, and no doubt the putting a letter into the post was proof of that fact. There was another case of *Metcalf v. Markham*, cited in argument, which, however, seems to me to be no authority on this point, because there the sending the letter from Hull, was clearly part of the cause of the action, and material evidence in the case. Another case to which I adverted in the course of the argument, is that of *The King v. Collicott*; there the prisoner was indicted for uttering forged stamps in Middlesex, a crime which has been considered as analogous to the present case. He lived in Middlesex, and sent the forged stamps by his servant in a parcel to London, that they might be forwarded from thence by a carrier to Bath; the judges considered the question, and seven were of opinion that he was guilty of uttering in Middlesex, but five others, whose names were entitled to great respect, very considerable lawyers, were of a contrary opinion. The result was, as might be expected, that no proceedings were taken on the verdict; but he was afterwards prosecuted for another offence in London. These authorities seem to warrant me in this observation, that the case of delivering a letter sealed, is not so clear a case of publication as to ex-

clude a defendant from the right to have the fact found specially; and it seems to me, that *by the course taken, the defendant has been deprived of this [*155 opportunity, for the question of a delivery sealed, never was presented for the consideration of the jury.

But it has further been argued, that whether there was a publication in Leicestershire or not, still this verdict ought to stand, for that the composing, writing, and publishing, constitute one entire offence, and that if part thereof be in one county and part in another, an indictment may be supported in either; and I was for a considerable time of that opinion, and had at one period consented, upon that ground, to refuse the rule. Upon the discussion, however, which has since taken place, and upon further consideration, I am by no means satisfied that this is so clear a point as to warrant us in concluding the defendant from having it put upon the record. I consider the evidence as establishing clearly that the defendant composed and wrote in the county of Leicester, and published in the county of Middlesex; and I think it impossible to deny but that he composed, wrote, and published with the intent charged in the information. And even now, if the attorney-general would consent to enter the verdict specially in that way, I should be against the rule for a new trial. Upon the best consideration, however, which I can give to the authorities, I am of opinion that the whole offence, the whole *corpus delicti*, must be in one and the same county; that there is no distinction in this respect between felonies and misdemeanors; and that, though the jury may inquire into collateral facts, or facts of inducement prior to the crime, or facts resulting from the crime, in another county, they are wholly confined to the county for what constitutes the offence itself. Hale's Summary, p. 203, says, "Regularly the grand jury can *in- [*156 quire of nothing but what arises within the body of the county for which they are returned;" but he states as an exception, "for a nuisance in one county to another, a jury of the county where the nuisance is committed may indict it." Now this mode of putting the case of nuisance, clearly implies that the rule extended to misdemeanors as well as felonies, and that such special case of misdemeanor was an exception to it. And why is it an exception? Because the whole body of the offence is in the county where the nuisance is committed; the jury there find in their own county a wrongful act, calculated to do mischief; and all they inquire out of their own county is into the consequences of such wrongful act. Lord HALE says, 2 Hale P. C. 163, "The grand jury are sworn ad inquirendum pro corpore comitatus; and, therefore, regularly they cannot inquire of a fact done out of their county, for which they are sworn, unless specially enabled by act of parliament, but only in some special cases;" and in p. 164, he says, "If A., by reason of a tenure of lands in the county of B., be bound to repair a bridge in the county of C., he may be indicted in the county of C." Now this, again, is a special exception in case of misdemeanor. The whole *corpus delicti* there is the neglect to repair, which is in C., and the ground of his obligation is only evidence to prove his guilt in C. Lord HALE cites 5 H. 7, 3, and 3 Ed. 3, Assize 440, in support of this position. In 2 Hawk. c. 25, s. 34, it is stated thus: "It seems to be generally agreed at this day, that by the common law no grand jurors can indict any offence whatsoever, which does not arise within the limits of the precinct for which they are returned." And in s. 37, "And *it seems, by the common law, if a fact [*157 done in one county prove a nuisance to another, it may be indicted in either county," still putting this (though a case of misdemeanor) as a case of special exception; for which he cites Summ. 203, Assize 446, and 19 Assize, 6. Sir W. Blackstone, vol. 4, p. 302, lays it down thus: "The grand jury are sworn to inquire only for the body of the county, pro corpore comitatus; and, therefore, they cannot regularly inquire of a fact done out of the county for which they are sworn, unless particularly enabled by act of parliament." And in page 305, after an enumeration of certain exceptions, he says, "but in gene-

ral, all offences must be indicted, as well as tried, in the county where the fact is committed." These authorities are all general, without distinction between felonies and misdemeanors, and seem to show, that though the evidence need not be confined to the county, the offence must. We have an instance of this in the case of bigamy, where the first marriage, which must be proved, may be proved to have taken place either in or out of the county where the offence is tried. But what is the whole offence? It is the second marriage, and the second marriage only, which is the *corpus delicti*, and that must be proved within the county, (unless the indictment is in the county where the prisoner was apprehended, which is specially provided for) and then the jury have jurisdiction to inquire into the other facts of the case. *Danby's case*, 2 R. 3, pl. 10, which has been cited, seems to me to fall within the same rule. There it appeared that the original writ was erased in London by Mundres, but the other erasures which completed the offence, were done in Middlesex, by Danby and three others. And the prisoners, in consequence of this, were not tried for *158] the felony, but were afterwards separately convicted in London and *Middlesex of the misdemeanor. But there each alteration was a complete common law misdemeanor; each offender was indicted in the county in which the whole of his misdemeanor was committed, and this case, therefore, is not an authority to show that a misdemeanor commenced in London and consummated in Middlesex, could be tried in either.

Upon these grounds, I think, this, at least, so far a questionable point, that if the publication in Leicestershire cannot be supported, the ground which I have last considered is not sufficient to support the verdict in its present shape, and that there ought to be a new trial, unless the attorney-general consents to a special verdict. The only remaining question is, whether, if the verdict be narrowed to the composing and writing, and the publishing and causing to be published be negatived, composing and writing constitute an offence. But the case seems hardly ripe for discussing that question. If the verdict be so narrowed, I shall readily give my opinion upon the question; but, till then, it is unnecessary. Upon the whole, therefore, I am of opinion that the verdict, as at present found, ought not to stand; and that, if it is not confined to composing and writing in Leicestershire, and publishing in Middlesex, there ought to be a new trial.

ABBOTT, C. J. I am of opinion, that the rule for a new trial in this cause ought to be discharged. The case has been argued at very great length on the part of the defendant, and many topics have been addressed to the court, some of a general nature, and others more particularly applicable to the case itself. It has been contended, that the whole crime of libel consists in the publication *159] alone, and that the author, or writer, is in "no degree criminal if his composition be not published. I intimated more than once, in the progress of the argument, that the decision of this point was, in my opinion, immaterial to the present case, because this is the case of a libel actually published by the authority and procurement of its author. I shall, therefore, abstain from giving any decided opinion upon this point, but I cannot forbear observing, that many of the passages quoted in support of the proposition, from the text of the civil law being expressed in the disjunctive, appear to me to be authorities rather against than in favour of the point for which they were adduced. The composition of a treasonable paper intended for publication has, on more than one occasion, been held an overt act of high treason, although the actual publication had been intercepted or prevented, and I have heard nothing upon the present occasion to convince my mind that one who composes or writes a libel with intent to defame, may not, under any circumstances, be punished, if the libel be not published. In any case in which this question may arise, the particular circumstances of the case will become fit matter for consideration at the trial.

The case of *The King v. Beare* came before the court after verdict. There

is no very clear and satisfactory report of it, and I will only say of it, at present, that I have no doubt that Lord HOLT considered the criminal intention charged in the indictment as not negatived by the verdict, and understood the word *only* to be confined to the acts done. It is true, that in cases of libel a publication has been generally proved, and the trial has been had in the county where publication took place. The place of publication is rarely a matter of doubt, the place of the writing or composition is often unknown, and as most of the cases of libel have been cases of publication, *judges and other [*160 persons, speaking of the crime of libel, generally, and without any thing requiring a distinction between the writing and publishing, may not unreasonably use expressions applicable to published slander.

It was further contended, that the word publication denotes an actual communication of the contents of the writing by the publisher to some other person, and we were referred to dictionaries for the sense of the word publication. But in the law, as indeed in other sciences and arts, some words are used in a peculiar sense, differing in a certain degree from their popular meaning. Thus, in the language of the law, we speak of the publication of a will, and the publication of an award, without meaning to denote by that word any communication of the contents of those instruments, and meaning only a declaration by the testator or arbitrator, in the presence of witnesses, that the instrument is his testament or award. In like manner the publication of a libel does not, in my opinion, mean an actual communication of the contents of the paper. Lord COKE says, a libel may be published, traditione, by delivery; and this is adopted by Lord Chief Baron COMYNS in his Digest, and is conformable to the civil law, wherein we find the word *edidit* used as applicable to this subject. Actual communication of the contents, as by singing or reading, is indeed one mode of publication; but it is not the only mode, nor the usual mode; the usual mode is by delivery of the paper, either by way of sale or otherwise; and upon proof of the purchase of a newspaper or pamphlet in Fleet-street, no one ever thought of asking whether the purchaser or other person read the paper or pamphlet in London or elsewhere.

*I shall now proceed to advert to the topics more particularly applicable to the present case. In the first place it was contended, that there was not, [*161 in this case, as it was said there ought to have been, any evidence of publication in the county of Leicester; and the manner in which this point was put to the jury, by my learned brother, at the trial, was made the ground of much objection. It was said, that the jury were directed to presume a publication in Leicestershire, without any sufficient ground; but, upon an attentive consideration, I am of opinion, that all that was done upon this subject, was well warranted by the evidence adduced at the trial. A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained, by inference, in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime, is or can be given; the man who is charged with theft, is rarely seen to break the house or take the goods; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against *him, in the absence of explanation or contradiction; but when such proof has been given, and the nature [*162 of the case is such as to admit of explanation or contradiction, if the conclusion

to which the proof tends be untrue, and the accused offers no explanation or contradiction ; can human reason do otherwise than adopt the conclusion to which the proof tends ? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily ; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected ; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men, conversant with the affairs and business of life, and who know, that, where reasonable doubt is entertained, it is their duty to acquit ; and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtlety and refinement. I have thought it right to premise these general observations, before I consider the particulars of the evidence in the present case, and I must also first take notice of a topic that was urged on this head, by one or more of the learned gentlemen who have argued for the defendant. It was said, and truly said, that guilt and crime are never to be presumed ; and the cases of supposed murder, mentioned by Lord HALE, and which have since operated as a caution to all judges, were quoted on this occasion. But the cases are wholly different. In those cases, there was no actual proof of the death of the person supposed to have been slain, and, consequently, no proof that the crime of murder had been committed. The *corpus delicti* was "not established. In this case, the crime, *163] so far as it consists in the composing and publishing the paper, was proved beyond all contradiction ; the paper was written by the defendant, and came to the hands of Mr. Brookes by the defendant's authority and procurement, not as a private and confidential communication, but for insertion in the public newspapers ; and the question is not whether there was any publication, but in what county the publication shall be deemed to have taken place ; a question arising entirely out of the locality of the jurisprudence of this country. If the prosecutor has mistaken the county in which the offence is charged, the defendant is entitled to avail himself of that mistake ; and I have as little inclination as authority to deprive him of his privilege ; and this brings me to the particulars of the evidence.

The information is laid in Leicestershire, and it charges that the defendant, in Leicestershire, composed, wrote, and published, and caused and procured to be composed, written, and published, a libellous paper. In support of this allegation, a paper was produced at the trial, in the handwriting of the defendant, dated the 22d of August, at Kirby Park ; a letter was also produced, written by the defendant to Lord Sidmouth, in which the defendant acknowledged that he was the author of this paper, and had transmitted it to town for insertion in the newspapers. Kirby Park is a mansion-house and residence of the defendant, a gentleman of fortune, in Leicestershire ; the defendant was seen riding on horseback, in Leicestershire, on the 22d of August, and also on the following day. From the contents of the paper, it appears to have been composed in some haste, in consequence of something which the defendant had just read in a newspaper.

*164] There is, therefore, "abundant proof, that the matter was composed and written by the defendant, in Leicestershire ; nor is that fact denied ; and if so, the paper must have been in his hands or power in Leicestershire, when the writing was finished. It was further proved, that on the 23d or 24th of August this paper was delivered to Mr. Brookes, in Middlesex. Mr. Brookes, a friend of the defendant, was the witness who proved this ; and the further account that he gave of the matter was, that the paper was brought to him by a Mr. Bickersteth, in an envelope, which he had mislaid, and which had no seal ; he did not know how it was directed, but he believed that it might be directed to Mr. Bickersteth ; and he said that it had the words "Pass this to Mr. Brookes," or something to that import. It is to be observed, that this witness would not take upon himself to say that the envelope was directed : he only said he

believed it might be; nor did he say whether the words were written within or without the envelope. Mr. Bickersteth was not called by the prosecutor or by the defendant; but it appeared, from the testimony of Mr. Brookes, that the prosecutor did not, before the trial, know that the paper had ever been in the hands of Mr. Bickersteth, for Mr. Brookes declined, at the trial, to name the person from whom he had received the paper, until he was told that he must do so.

The defendant, on the contrary, knew how and in what manner he had parted with the paper; he knew that his trial was to take place in Leicestershire, and he came to the trial ready to object to the county. Upon these facts the question arises, whether the jury might reasonably infer and conclude, in order to satisfy the locality of jurisdiction, that the paper had passed from *the defendant in the unsealed envelope to Mr. Bickersteth, in Leicestershire, as the judge informed them they might, in his opinion, do. The learned counsel for the defendant had argued with much ability at the trial, in the hearing of the jury, that the evidence furnished nothing upon which any inference could be drawn of a publication of any kind in the county of Leicester; the jury had witnessed the examination of Mr. Brookes, who was the agent for the defendant, for transmitting the manuscript to the editors of the public newspapers; this agency is acknowledged by the defendant in his letter to Lord Sidmouth. I have considered this question again and again, and with much anxiety, from respect to the different opinion entertained on this point by my brother BAYLEY, and I must say, that in my opinion the premises warranted a conclusion that the paper had been delivered by the defendant in Leicestershire to Mr. Bickersteth, in the state in which the latter gentleman delivered it to Mr. Brookes. The learned counsel have contended, that for any thing that appeared, the paper might have been sealed by the defendant before it quitted Leicestershire; that the defendant might himself have carried it out of Leicestershire, and delivered it in some other county to Mr. Bickersteth, or to some other person, or might himself have put it into some post-office out of Leicestershire. Now Mr. Bickersteth might have proved for the defendant in what state, and at what place, and in what manner he had received the paper, but he was not called; and as I have before observed, this was a question which the defendant came prepared to try, so that there was no surprise. The defendant was a member of parliament; he might have sent this paper free of postage, directly to Mr. Brookes, and there *was no apparent reason for his sending it by the post, or otherwise, to Mr. Bickersteth, in London, to give him, (a professional gentleman, as he is described to be, but whose place of residence does not appear,) the trouble of taking it in person to Mr. Brookes. The paper professes to have been written in haste, and it appears to have been intended for an immediate publication in the newspapers. It is dated on the 22d, and appeared in at least one morning paper on the 25th. Mr. Brookes said he did not recollect on what day, nor indeed at what time in August he had received the paper; he said he copied and sent it to the newspapers; this must have occupied some little time. It cannot have been delivered to Mr. Brookes later than the 24th; at what time it was finished on the 22d does not appear; the distance of Kirby Park from the Stand is, I suppose, not less than a hundred miles, but that matter would be better known to the jury than to me. The defendant was proved to have been in Leicestershire on the 22d and 23d. To have presumed that he had himself gone out of the county to deliver this paper, for no reason apparent or suggested; or that a paper delivered by a private hand unsealed, and not appearing to have been sent by any conveyance requiring a seal, was in fact sealed before it was dispatched, or was sent by any other hand or conveyance, than the hand that delivered it, would, indeed, in my opinion, be to draw a conclusion without any premises to warrant it. It certainly would be to introduce by way of presumption, some new and affirmative matter

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of fact not found in the evidence, but of which, if really existing, the evidence was in the knowledge and power of the defendant. Then why, in the absence of all the explanation and proof that the "nature of the case affected" of a delivery out of the county or in a sealed cover, or to another person, if the fact was really such, might not the jury reasonably decline to presume any of those facts, and conclude, from the proof before them, that the defendant had delivered the paper to Mr. Bickersteth, in that county in which alone the defendant was proved to have been, and in that state in which alone the paper ever appeared to have been? I can discover no reason why that conclusion might not be drawn; on the contrary, I think it might reasonably be drawn as a legitimate conclusion from the proof given, in the absence of all contradiction.

It is not necessary, to sustain the verdict on this point, that this should be the only conclusion that could be drawn from the premises. Matters of fact are for the determination of the jury; if they draw a conclusion not warranted by the premises before them, it is our duty to correct their error, and to send the case to another trial; but if the conclusion is a reasonable inference from the premises, we ought not to disturb their verdict. I think this conclusion the most reasonable inference from the premises, and that the judge was perfectly justified in presenting the matter to the jury for their consideration, in this light, with a strong expression of his own opinion in favour of this conclusion.

I have given my opinion thus largely on this point, on account of the great importance that has been attached to it in the course of this cause, and this being my opinion, I might forbear to advert to another topic that has been addressed to us, but I think it right to advert to, and give my judgment on that matter, not "only on account of its general importance, but because the particular point on which so much has been said, and to which I have already adverted, would, but for an observation made by my learned brother to the jury at the trial, be in my own opinion of little importance on the question properly brought before us, which is, whether there ought to be a new trial. By presenting the matter to the jury, in the mode adopted by my learned brother at the trial, the cause was put as to the point of publication, on an issue much more favourable to the defendant, and giving him a much greater chance of acquittal pro tanto at least, than the law required. For I am most clearly of opinion, that upon the facts proved, and the inference necessarily arising out of them, and also that upon the facts taken simply by themselves, and without deducing any other fact by way of inference from them, and leaving, therefore, as to this part of the case, nothing to be found by the jury that is not already established, the defendant might lawfully be tried, and ought to have been found guilty of the whole charge contained in this information in the county of Leicestershire. And I cannot persuade myself to think that the court would be justified in granting a new trial for the purpose of having certain facts specially found, and put upon the record, if the court be convinced, as I in my judgment and conscience am convinced, that upon the facts so found, the court would be bound to pronounce the defendant guilty, especially in a case wherein that was not asked at the trial. What are the facts? The defendant wrote the libel at his own mansion-house in Leicestershire on the 22d of August; he was seen in Leicestershire riding on horseback on that day, and also on the following day; the "paper was delivered to Mr. Brookes, in London, by a third person on the 23d, or at the latest on the 24th August, and this by the authority and procurement of the defendant, for insertion in some London news papers. Upon these facts, can any man hesitate to infer that the defendant, in some way delivered the paper out of his custody in Leicestershire that it might pass to London? And if he did there deliver it for that purpose, such a delivery was at the least a commencement in Leicestershire, of the traditio or act

of publication. Now the fact of such a delivery in Leicestershire, can scarcely be called an inference, for it is nothing more than saying, that the defendant did the act in the county in which he is proved to have been on the day on which he did it, he not appearing to have been out of the county on that day, and the act being such, as regard being had to his rank and situation in life, would in the ordinary course of things take place at his own house.

But it is said to be possible, that he may have carried the paper out of the county in his pocket and have parted with it in some other county; and much has been said in the argument about the vicinity of Kirby Park to the borders of some other county. I presume the distance is not very great, and some of the jury would probably be acquainted with it. I admit the possibility of the fact suggested, its probability I utterly deny. But if I should even go further, and having first converted the possible into the probable, should then take another step in this process of presumption, and assume the supposed probable to be the real fact, and thus at length conclude, that the defendant did carry the paper out of Leicestershire in his pocket, and deliver it from his hands in some other county, to be forwarded to *Mr. Brookes, I should still be bound to say, [*170] that the defendant might lawfully be tried, and ought to have been convicted of the whole of this charge in the county of Leicester. The commencement of the traditio or delivery, would still be in Leicestershire by the act of the defendant himself carrying the paper from his house into that county, in its progress to Mr. Brookes. To write and publish a libel is a misdemeanor compounded of distinct parts, each of which parts (for I am speaking of a published libel) being an act done in prosecution of one and the same criminal intention, is a misdemeanor. And where a misdemeanor consists of such distinct parts, I say, without doubt or hesitation, that the whole may be tried in that county wherein any part can be proved to have been done. All that I have heard from the learned gentlemen who have argued the case on the part of the defendant, and have presented this matter to the court in every various view that ingenuity could devise, has not for one instant raised a particle of doubt in my mind; and having no doubt, I should abandon the duty of my office, if I did not declare my own conviction, and act judicially upon it.

If the law should be otherwise, I know not very well what consequence is to follow. At one time it was argued, that the trial could be in that county alone wherein the paper was received and read, which was called the place of the publication. If this be true, one of two consequences must follow, either the party must be convicted of the whole offence in the latter county, and then the jury of that county will inquire into, and find criminal matter committed in another, which would be contrary to other parts of the argument addressed to us, or the party must be acquitted of the writing; and if [*171] the latter alternative be correct, then an author can never be punished as such if he happen to write at one side of Temple Bar and publish at the other. At another time it was contended, that in the case supposed, the party could not be tried in either county, or in other words, that he could not be tried at all; and if it be true that a misdemeanor can be tried in that county alone wherein every part of it has been committed, the impossibility of any trial in the supposed case, would be a conclusion fairly deducible from the premises. But the conclusion would be an absurdity in the law, and the absurdity of the conclusion proves the falsehood of the premises.

Felony stands on a very different ground from misdemeanor; and the assertion that a misdemeanor can be tried in that county alone wherein every part of it was committed, appears to me to have been built upon a mistake of the true ground and reason of the doctrine in felony. This mistake, however, is not new, and therefore in no degree surprising, for we find in many of our books, and even in the preamble of the statute of the second and third Edward

6, c. 24, expressions importing that a jury of one county cannot inquire into, or take cognisance of any fact that happened in another. It was admitted on the present argument, that the generality of these expressions must be so far restrained as to confine their import to criminal matter, or rather to a part of the crime, because daily experience shows, that the proof of introductory or explanatory matter occurring in either county, is received without objection, even in cases of felony. There was a time, however, when it was supposed that a jury could not even in a civil action *inquire into a matter that did not take place in their own county. In the time of Henry the Seventh, an action of debt was brought upon a bond. The condition of the bond, according to the report in one part of the Year-book, was, that if a certain ship should sail to Lynn, and from thence go to Norway, and return from Norway to London, then the bond should be void; otherwise, that it should stand good. Now, upon this it was said, that as Norway was a place ultra mare, no jury in England could try or know whether the ship had been in Norway; that the fact upon which the condition depended was, therefore, a matter not triable; and a condition containing matter not triable was the same as a void condition, and that where the condition of a bond was void, it was the same thing as if the bond was made without any condition, and so the bond must stand good and be available as a single bond; and there is much learned and subtle reasoning upon those points, on one side and on the other, and the case was adjourned. So easy is it for men to perplex themselves, and even to deduce absurd conclusions, if once a false proposition be admitted as true. The case occurs afterwards in another part of the book in the following year, and there the condition is differently stated, but still, in such a way to make the return from Norway material. It appears not to have been decided at that time, and I have not traced the final result. (10 H. 7, fo. 22; 11 H. 7, fo. 16.)

The true ground of the doctrine in felony is this; if a felony be compounded of two distinct acts, one of which takes place in one county, and the other in another county, the concurrence of both being necessary to constitute the felony, *173] the party may not be triable in either, because, ex hypothesis, there is no felony committed in either. The case of a stroke in one county and death in another, was considered by some as of this kind. The stroke was not a felonious act at the time; and the death, though consequential to the act of the striker, seems not to have been considered by them as properly his act, and to remedy this inconvenience, the statute 2 and 3 Edw. 6, c. 24, was passed. It seems somewhat extraordinary that the preamble of this part of the statute should be expressed in the terms in which we find it, because (1 P. C. 426) Lord HALE mentions this point as being doubtful at the common law, and says the more common opinion was that the party might be indicted where the stroke was given, and in the same page there is a reference to Coles's case, Plowden, 401, to show that a general pardon, whereby all misdemeanors are pardoned, intervening between the mortal stroke and the death of the party stricken, doth pardon the felony consequentially, because the act that is the offence, is pardoned, though it be not a felony until the party die.

Observations of the same kind may be made upon the case of accessories in one county, whether before or after the fact, to a felony committed in another county. The act done, whether of prior advice or procurement, or of subsequent receipt and harbouring, is not a felonious act, if taken singly and by itself; but requires the concurrence of some other act, to give the felonious character. Both descriptions are provided for by the same statute, though the preamble speaks only of accessories after the fact; and the case of accessories before the fact does not seem to have been very clearly settled at the common law, for according to a case in Keilwey, p. 67, *it appears that accessories before the fact, in one county, to a murder committed in another, might be ar-

raigned and tried in the county wheres the murder was committed. In the Year-book, 9 Edward 4, pl. 48, there is a case of a person *indicted* in Middlesex, for there procuring one I. S. to commit a murder, who committed it in Berks; and because the accessory could not be arraigned until the principal was attainted or acquitted, the court wrote to the justices and coroners of Berks to certify whether I. S. was indicted for the murder, and upon a return that he was not, the accessory was discharged. Now, it was wholly unnecessary to obtain such a certificate, and the party ought to have been discharged immediately, if the indictment against him in Middlesex could not be sustained, in case the principal had been convicted in Berkshire. In the case of the appeal of robbery reported in Dyer, fol. 38, it appears to have been the opinion of one, if not both the judges present, that the procurer of a felony might be indicted in the county where his procurement was. But in that case an appeal of robbery brought in Wiltshire, where the robbery was committed, against the procurers thereof in London, was quashed; for, says Lord Coke, in *Bulwer's case*, 7 Coke, 2 b, who there cites this case of the appeal from Dyer, "in case of felony, which concerns the life of a man, every act shall be tried in the proper county where the act was in truth done." This case of life, though, perhaps, not a good logical reason for a distinction, is, undoubtedly, a ground for the utmost caution, and is well known to have operated strongly upon the minds of judges in all times. It has, indeed, led in some cases to such subtlety and refinement of construction, and to the giving way to such nice and formal objections, as were in the opinion *of Lord HALE a reproach to the law. But as the reasons which may be assigned in cases of felony do not apply to other cases, so neither has any instance been found wherein a misdemeanor, composed of acts in different counties, each act being in itself a misdemeanor, has not been held wholly triable in that county wherein any criminal part was committed. The case of the seven bishops, which was referred to in the motion, does not establish any thing of this kind; for in that case, which was an indictment in Middlesex, there was not at any period of the trial, any proof of the writing in Middlesex, nor, for a very long period, any proof of a publication in Middlesex. And the difficulty as to the locality of trial, was in the end so far removed as to become a question for the jury, under circumstances to which I need not now advert, by the testimony of the lord president of the council. And even after his testimony, the identity of the paper was to be collected by inference, which was not objected to. The doctrine of Lord Coke in *A Institute*, page 80, in his commentary on the statute 4 James 1, cap. 8, was applied to the case of felony. I will now refer to *Bulwer's case*, and the authorities there cited, premising only that I am not aware of any authority pointing to a distinction between local actions and indictments for misdemeanors. The power of the jury appears, upon principle, to be not less limited in the one case than in the other. *Bulwer's case* was an action brought in the county of Norfolk, for maliciously causing the plaintiff to be outlawed in London, upon process sued out of a court at Westminster, and causing him to be imprisoned in Norfolk upon a *capias ut ligatum* directed to the sheriff of that county, but issued at Westminster. It was *objected that the action was not maintainable in the county of Norfolk, but the contrary was decided, because where matter in one county is depending upon matter in another county, the plaintiff may choose in which county he will bring his action, unless the defendant should be prejudiced in his trial. And of this proposition numerous instances are there cited relating to actions, some of which were then considered as local, though, perhaps, they might not be so now, and others which would still be so considered. Among the instances, are conspiracy in one county to indict a man falsely, followed up by an indictment preferred by the same parties in another county; neglect to repair a wall in Essex, whereby the plaintiff's land

in Middlesex is overflowed ; and the forgery of a deed in one county, and publication of it in another. This last instance exactly resembles the writing of a libel in one county, and publication of it in another, and is less strong than the writing in one county and sending or carrying from thence into another, in order that it may be received and read. For the sending or carrying in the latter case, is the commencement of the publication ; the receipt and reading are its consummation ; the sending is the act of the party, and so also is the carrying of it, if it be carried by the writer ; and the melior notitia that has been alluded to, seems to be, as it regards such a party, in the county in which his own acts are done.

A very early instance of misdemeanor, wherein the whole matter was inquired into in one county, is *Danby's* case, in 2 Richard 3, fo. 10, cited in 1st Pleas of the Crown, fo. 652. The proceedings, to an outlawry, consisting of an original writ, three writs of capias, and a writ of exigent, had been altered, *177] by the erasure of *the Christian name of the defendant, who was therein called *John*, and the substitution of *William* in its place. This alteration in the original writ was made by one person, in London, and in the several other writs, by three other persons, in Middlesex. The whole matter, taken together, was considered as a felony, under the statute of 8 Henry 6, c. 12. It seems that the several writs were considered as constituting but one record ; and this offence, thus committed in parts, was held not to be triable as a felony ; but it was held, that the one offender might be tried in London and the others in Middlesex for the misprision, which was accordingly done, and they were punished ; and though it may be true, as was said by one of the learned counsel, that the whole act of the person tried in London, was committed there ; yet it seems to have been thought necessary to prove all that had occurred in Middlesex. A part, viz. the issuing of the writ, was certainly necessary, but this was no criminal part ; and the case is not so material in itself, as for the observations made upon it by Lord HALE. "And yet observe," saith he, "the felony was one entire felony, committed in two counties, and so neither inquirable nor determinable in one county ; for the jury of that county cannot take notice of part of the fact committed in another ; and yet the misprision of that felony was inquirable and punishable in either county, where but part of the felony was committed ; and yet the jury, in that case, must take notice of the entire felony, part whereof was committed in another county." The expression misprision of felony, does not seem to be very correctly used in this case ; for misprision of felony is the concealment of a felony, *knowing it to have *178] been committed by another. This was the case of acts done by the parties themselves.

In the case of *The King v. Williams*, in 2 Campbell, 505, which is reported to have been an indictment in Middlesex, for sending, but was, in fact (as appears by the record), an indictment for composing and writing, and causing to be composed and written, and sending and delivering, and causing to be sent and delivered, a libellous letter, with intent to provoke a challenge ; the letter being sealed up, was put into the post-office, by the defendant, in Westminster, addressed to the prosecutor, in London, who received it there. Objection being taken, that there was not any evidence of an offence committed in Middlesex, Lord ELLENBOROUGH said there was a sufficient publication in Middlesex, by putting the letter into the post-office there, with intent that it should be delivered to the prosecutor elsewhere. In the case of *The King v. Watson*, 1 Campbell, 215, the prosecutor failed in proving that the first letter was put into the post-office in Middlesex, and it was received in another county. Mr. Justice GROSE, in delivering the judgment of the court, in *The King v. Brisac and Another*, 4 East, 171, says, "There seems no reason why the crime of conspiracy, amounting only to a misdemeanor, may not be tried, wherever one

distinct overt act of conspiracy is, in fact, committed, as well as the crime of treason. In *The King v. Bowes and Others*, the trial proceeded upon this principle; where no proof of actual conspiracy, embracing all the several conspirators, was attempted to be given, in Middlesex, where the trial took place, and where the individual acts of some of the conspirators were wholly confined to other *counties than Middlesex; but still the conspiracy, as [*179] against all, having been proved, from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it in different places and counties; the locality required for the purpose of trial, was holden to be satisfied by overt acts done by some of them, in prosecution of the conspiracy in the county where the trial was had." Another instance of this kind, is the decision of the judges, in the case of *The King v. Butterly*; he was indicted on the statute of 30 Geo. 2, c. 24, s. 1, for obtaining money by false pretences. The language of the statute makes the offence to consist in obtaining the money, and not in using any false pretence, whereby money shall be obtained. The indictment was in Herefordshire, the false pretence was in Herefordshire; but the money was received in Monmouthshire; the judges thought the indictment was laid in the wrong county; they did not think the party not indictable at all, which they ought to have done, if the proposition addressed to us be true, because the pretence which was necessary to constitute the crime was in one county and the receipt in another; and so there was no entire crime in either. The instances of treason which were alluded to by Mr. Justice Grosé, are well known; see 1 East's Pleas of the Crown, 130; and they go this length, viz., that one witness to an overt act in the county wherein the indictment is preferred, is sufficient, if another overt act in another county be proved by another witness; and so, as there can be no conviction, but by the testimony of two witnesses, the jury must take cognisance of criminal matter committed out of their county, as the foundation of a conviction; and treason and misdemeanor are alike distinguishable from *felony, on the ground [*180] that I have already mentioned, viz., that each act is an offence of the same species with every other and with the whole; whereas an act requiring the concurrence of some other act or matter, to constitute a felony, may not be in itself a felony, and may either be an offence of a different nature, punishable as such, or lose its character by merger in the other act or matter, so as to become punishable, for want of the locality necessary to a trial.

In cases of felony, the legislature has, on more than one occasion, intervened to prevent the failure of justice, occasioned by the rule to which I have adverted. I am not aware that the legislature has interposed in any case of misdemeanor; and I cannot help thinking that the absence of any such enactment furnishes an argument to show that nothing of this kind has been thought necessary, and that it has been generally understood that a conviction for a misdemeanor might take place in the county wherein any such part thereof as I have mentioned should have been committed, for otherwise there would, in many cases, be a great failure of justice. I cannot, therefore, do otherwise than say I am of opinion in the way I have expressed myself, and for the reasons I have given that if any such part of an entire misdemeanor be proved to have been done in the county in which the indictment is preferred, there is enough to satisfy the locality of trial, and here there is not only the fact of composing the paper in the county of Leicester but some act must have been done by Sir F. Burdett by delivering the paper, or carrying it himself out of that county. Some act must have been done in that county as the commencement of sending it for publication.

*The next ground taken in support of the motion for a new trial was, [*181] that the learned judge had rejected evidence offered at the trial to prove that some of the king's subjects had been killed and wounded by the dragoons on

the 16th August, or, in other words, that evidence of the truth of the fact, alleged in the libel as the foundation and cause of the remarks therein contained, was tendered and refused. I am of opinion, that this evidence was properly refused. The whole history of the law of libel shows that such evidence has been almost invariably refused on all occasions of criminal prosecution for slanderous observations and remarks upon the administration of the government, or upon the conduct of public or private men. The reason of this part of the law has been so often explained, that it is altogether unnecessary to enter into it at present. I will only quote the opinion of one of the most eloquent writers of antiquity, who united the characters of philosopher and statesman. Cicero having cited the law of the twelve tables, made for the punishment of any one, "qui Carmen condidisset quod infamiam faceret flagitiumve alteri," immediately subjoins "Præclare judiciis enim ac magistratum disceptationibus legitimis propositam vitam, non poetarum ingenii, habere debemus, nec probrum audire nisi ea lege ut respondere licet et judicio defendere." The case of the Seven Bishops has been mentioned as an instance of evidence received on the part of a defendant; but in that case the evidence was not offered to prove any matter of fact mentioned in the supposed libel, which was a petition to the king, but to show that the king had not the power of dispensing with an act of parliament, which was *182] matter of law; and the evidence consisted of *the records of proceedings in parliament, and was addressed to the court rather than to the jury. The case of Mr. Horne, tried before my Lord MANSFIELD, was also quoted, as an instance of receiving evidence of facts. Upon looking into that case, it appears that Mr. Horne, who conducted his own defence, did not open his evidence to the jury, as usual, but sat down without proposing to call any witnesses; and when he afterwards proposed to call some, and the attorney-general objected, Lord MANSFIELD said, "You had better not object; you had better hear his witnesses." And they were accordingly examined. Such an instance can, in my opinion, be of no avail against the current of prior and subsequent practice; it certainly can be of no avail against the opinion of the judges, delivered in the House of Lords, in answer to a question on this particular point, propounded to them by the house on the occasion of the passing of the statute 32 G. 3, c. 60, commonly called the Libel Bill; and the still more important fact that the legislature having its attention directed to this subject at that time, left the law in this respect in the situation wherein the judges reported it to stand. Another case, that occurred before me, was also referred to; in that case, however, the truth was not offered in evidence by way of defence, but the evidence of the falsehood was adduced by the prosecutor, as necessary to support the charge. No objection was made on the part of the defendant; and although I was not free from doubts in my own mind, yet, adverting to the particular nature of the supposed libel, which contained little more than a narrative of certain facts, supposed to have taken place in one of the West India islands, I *183] did not think myself warranted in interposing "under the very peculiar circumstances of that case; and, having received evidence of the falsehood, I should, most undoubtedly, have received evidence of the truth, if any such had been offered, on the part of the defendant.

Another ground of the motion was, that the learned judge gave his own opinion to the jury upon the character of the publication in question, expressing himself at the same time somewhat to this effect: You are to say whether you will adopt this opinion or not; and unless you are satisfied that I am wrong, you will take the law from me. This was supposed to be contrary to, or at least beyond the duty of the judge, as prescribed by the statute to which I have just alluded; it was, however, in my opinion, not only not contrary to or beyond the duty of the judge as prescribed by that statute, but in strict conformity to it. The clauses of the statute have been referred to. If the judge is to give

his opinion to the jury, as in other criminal cases, it must be not only competent but proper for him to tell the jury, if the case will so warrant, that in his opinion the publication before them is of the character and tendency attributed to it by the indictment; and that, if it be so in their opinion, the publication is an offence against the law. This has been repeatedly done by different judges within my experience, and I am not aware of any instance in which it has been omitted. The contrary has sometimes occurred, in cases where the judge has thought that the matter of the publication was innocent; but those cases also are instances of an opinion given, and not of silence on the part of the judge, as to the law of the case. The statute was not intended to confine the matter in issue exclusively to the jury *without hearing the opinion of the judge, [**184 but to declare that they should be at liberty to exercise their own judgment upon the whole matter in issue, after receiving thereupon the opinion and directions of the judge. For these reasons I am of opinion that the rule ought to be discharged.

BEST, J. I entirely agree with my lord chief justice and my brother Holroyd, in the opinion, that if a libel be written in one county and published in another, the libeller may be prosecuted in either.

Rule discharged.

CAMELO v. BRITTON.

A license for the exportation of gunpowder was granted on the petition of A. B. on behalf of himself and others, on condition that the merchant exporter should give a certain security therein mentioned. A. B., the manufacturer of the gunpowder, sold it to C. D., and contracted to deliver it free on board a ship: Held, that the condition of this license was not complied with by A. B.'s giving the required security, he not being the merchant exporter within the meaning of the license.

ACTION ON a policy of assurance, dated on 30th January, 1817, effected in the name of the plaintiff at and from London to Pernambuco, to wait orders to enter there or proceed for Maranham, by the policy the insurance was expressed to be on wine, shot, lead, gunpowder, and goods in bales and cases, valued at 2500*l.*, at a premium of 50*s.* per cent. The first count of the declaration alleged that the defendant subscribed the policy for 200*l.*; that the plaintiff was interested; that the ship sailed with the goods insured on board, and that afterwards, to wit, on the 15th April, the said ship or vessel with the said goods and merchandises on board thereof, arrived off Pernambuco aforesaid; and that afterwards, and before the said ship or vessel could enter Pernambuco aforesaid, and during the continuance *of the said voyage; to wit, on the day and year last aforesaid, the said ship or vessel with the said goods and merchandises [**185 on board thereof as aforesaid, was with force and arms arrested, seized, and detained by certain officers and subjects of the King of Portugal, and carried to a certain other port; to wit, the port of Bahia. And that afterwards, to wit, on the 22d May in the year aforesaid, at Bahia aforesaid, the said goods and merchandises were condemned and confiscated; and thereby the said goods and merchandises became and were wholly lost to the plaintiff. The second count alleged the loss generally by seizure and detention. Plea, general issue. The cause was tried before ABBOTT, C. J., at the sittings at Guildhall, before Easter term, 1819, when the jury found a verdict for the plaintiff, subject to the opinion of the court on the following case.

The defendant subscribed the policy for 200*l.*, and the plaintiff was interested in the goods insured. The plaintiff is by birth a Portuguese subject, but has been domiciled in London, and has carried on trade there as merchant since the year 1809. Pernambuco and Maranham are parcel of the dominions of the crown of Portugal. The Venus, the ship mentioned in the policy, was char-

tered by Messrs. Josling, Allen, and Freneira, Portuguese merchants in London in January, 1817, to carry out a cargo of sundry merchandise to Pernambuco and Maranham, and to bring back a return cargo. The goods insured consisted of 9 hogsheads of Madeira wine, 6 pipes of red wine, 30 barrels of small, or bird shot, 4 rolls of sheet lead, 10 cases and 14 bales of manufactured goods, and *186] 100 barrels of gunpowder. For a number of years past, gunpowder *has been usually shipped from this country to Pernambuco and Maranham, and imported there, but if the Portuguese government did not choose to purchase such gunpowder, the shipper was obliged to re-export it, unless in occasional instances, where a sale to other people has been allowed by that government. The form of shipping goods, including gunpowder, in London, on a voyage to Pernambuco and Maranham, has been to exhibit the cockets and manifest at the office of the Portuguese consul, who certifies the same, and affixes his consular seal to them. The cockets and manifest so certified, proceed with the ship, and must be delivered at the custom-house at the destined port, before the ship is admitted to entry. Copies of them are likewise sent by the Portuguese consul in London, to the custom-house at the port of destination, by the first opportunity. The Venus was cleared in this form at the office of the Portuguese consul, for the voyage in question. She carried 400 barrels of gunpowder, 300 having been shipped by Josling, Allen, and Freneira, on their own account, and the remaining 100 on account of the plaintiff. The cockets and manifest of the whole cargo were certified in the manner above stated, and proceeded with the ship to be exhibited to the custom-house at Pernambuco. The whole of the gunpowder was manufactured in this country by one Mark Fossett, and sold by him to the house of Josling, Allen, and Freneira, and to the plaintiff. Mark Fossett, who usually applied for licenses for the exportation of gunpowder, manufactured by himself, was employed by Josling, Allen, and Freneira, and the plaintiff, to procure a license for the exportation of the 400 barrels of gunpowder, to be shipped in the Venus, and procured a license from *187] government, *of which the following is a copy : "At the council-chamber, Whitehall, the 25th January, 1817. Present, the Lord of his Majesty's Most Honourable Privy Council: Whereas, there was this day read at the board, the humble petition of Mark Fossett, on behalf of himself and other persons, praying leave to export 500 barrels of gunpowder from London to Pernambuco, on board the British ship Venus, Lawson master: which petition being taken into consideration, it is hereby ordered in council, that the petitioners be permitted to export the quantity of gunpowder above mentioned, from London to Pernambuco, on board the said ship, provided the *merchant exporter* do first give security by bond to the proper officers of the customs, with two other able and sufficient sureties (of whom the master of the ship to be one) to be approved of by the said officers of the customs, in six times the value of the gunpowder, to export the same to the place proposed, and none other; and to produce a certificate within eighteen months from the date of the bond, from the British consul or vice-consul of Pernambuco, of the gunpowder having been all duly landed at that place; which certificate the commissioners of the customs are required to transmit to the lords commissioners of his Majesty's treasury, in order to be laid before this board. And in failure of the production of such certificate within the time limited by this order, the bond so entered into to be put in suit; and the right honourable the lords commissioners of his majesty's treasury are to give the necessary directions herein accordingly.

(Signed) JAMES BULLER."

On the 29th January, a bond for 7200*l.*, in the common form, to his majesty, was executed by the said *Mark Fossett, Henry Cooper, and *188] James Lawson, the master of the said ship. The condition was as follows: "Whereas, by an order in council, dated 25th January, 1817, permit-

ting Mark Fossett, on behalf of himself and others, to export 500 barrels of gunpowder to Pernambuco, on board the British ship Venus, Lawson master, provided the *merchant exporter* shall first give security, by bond, to the proper officers of the customs, with two other able and sufficient sureties, of whom the master of the ship to be one, to be approved of by the said officers of the customs, in six times the value of the said gunpowder, to export the same to the place proposed, and none other; and to produce a certificate, within eighteen months from the date of the bond, from the British consul or vice-consul, at Rio Janeiro, of the said gunpowder having been all duly landed at that place: And whereas the said Mark Fossett, this day, entered outwards, at the custom-house, London, on board the above ship Venus, James Lawson, for Pernambuco, 400 barrels of gunpowder. Now the condition of this obligation is such, that if all the said gunpowder shall be exported to Pernambuco, and a certificate of the due landing the same at that place, produced within eighteen months from the date hereof, from the British consul or vice-consul, then the obligation to be void and of none effect, or else to remain and be in full force and virtue." The above bond was approved of by the proper officers of the customs, and the gunpowder was thereupon allowed to be shipped. The clerk to the person who supplied the bird-shot proved that it was not considered as warlike stores. The goods of the plaintiff, being shipped on board the said vessel, were all consigned, on his account, to Manoel Ribeiro das Silva at *Pernambuco. [189] The ship sailed on the voyage, insured on the 4th February, 1817, and was obliged to put into Spithead, where she was detained by contrary winds till the 12th March, when she again proceeded for Pernambuco. On the 15th April she made the land, eight miles to the northward of Pernambuco, and stood to the southward to make the port. The master hoisted English colours, and made the usual signal for a pilot. No pilot came on board, but two Portuguese ships of war were seen standing in for the roads of Pernambuco, and the master of the Venus steered towards them to make inquiries respecting the anchorage, being a stranger to the place. When the Venus approached the Portuguese ships, one of them fired a shot at her, and sent a boat to board her. An officer and several men from such boat did immediately board her. This officer asked Captain Lawson where he was bound to, and upon his saying to Pernambuco, the officer told him his ship must not go into Pernambuco, but must come to anchor between the two ships of war. The said officer immediately took possession of the Venus, and desired one of his men to take the helm, who did so accordingly, and she was thereupon brought to anchor between the two ships of war. The Portuguese officer then compelled the captain to deliver up all the ship's papers, and to go on board one of the ships of war called the Spirito Santo. The papers were inspected by the officers of that ship, put into a bag, and delivered to the prize-master. The same evening, the captain was again sent on board the Venus, and the person to whom the ship's papers were delivered, with eight Portuguese sailors, went on board likewise, and took command of the Venus as prize-master; eight of her crew were at the same time taken out and sent on board the ships of war. [190] On the following morning the Venus, under the command of the prize-master, sailed for Bahia, a Portuguese settlement, where she arrived on the 21st April. As soon as she was anchored in the bay, several boats, containing officers of various descriptions, came alongside, and the officers entered and remained on board. On the 23d April she was removed higher up the harbour, and on the 28th a soldier was put on board as a sentinel, and was relieved night and morning. On the 30th April and 3d May several custom-house officers, and about thirty men, seized and carried away from on board the Venus the 400 barrels of gunpowder, and conveyed them to the fort at Bahia. The whole of the cargo was removed in the same manner between that day and the 9th May, a sentinel

remaining on board till then, when he was withdrawn. Neither the captain nor the mate, nor any of the crew of the Venus, was ever cited in or made party to any judicial proceedings respecting the said goods, or was ever examined as a witness in any court of justice, or upon interrogatories, at Bahia or elsewhere, respecting the goods. When the captain arrived off Pernambuco, he did not know, nor had he received any notice or heard, that Pernambuco had been or declared to be, or was in a state of blockade, and he first heard of such blockade two days after being taken possession of by the Portuguese ships of war. An insurrection broke out at Pernambuco in February, and was not heard of in London till June. As soon as the plaintiff heard of the ship being seized (viz. on the 26th June, 1817,) he gave notice of abandonment to the defendant and the other underwriters on the policy.

*191] *The case then stated a proclamation of the Prince Regent, dated the 2d January, 1817, prohibiting the exportation of gunpowder without license, to certain places therein mentioned, amongst which were the territories of the King of Portugal, in America. The case then set out the sentence of a court, describing itself as a supreme court of judicature at Bahia, stating, that it appeared from the proceedings before them, that the English brig Venus being bound to the port of Pernambuco, with a cargo consisting of 400 barrels of gunpowder, and other warlike stores, at a time when the port was under blockade, in consequence of an insurrection of its inhabitants, the said brig was detained and ordered to be sent into the port of this city, by reason of the 400 barrels of English gunpowder which she was so conveying to a blockaded port, being an article expressly prohibited, and declared to be contraband by the decree of the 26th February, 1810; and the laders and owners of such article being consequently comprehended and included in the penalties imposed by the letters-patent of the 5th January, 1785, against all dealers in contraband articles. The decree then proceeded to condemn the gunpowder. The case was argued in last Hilary term by

Campbell, for the plaintiff. Prima facie, the underwriters in this case, are liable for a total loss with benefit of salvage. The ship was captured, the goods insured were taken from the possession of the master and crew, and never were restored, and there was a notice of abandonment. The first objection anticipated is, that the loss arises from the act of the government of the assured, *192] for a contravention of the laws of that government; but the sentence *set out in the case, is not the sentence of an admiralty court proceeding upon the law of nations, but of a municipal court proceeding upon the particular ordinances of the state under whose authority it acts. The sentence, therefore, is not receivable as evidence of any of the facts which it alleges. There is nothing to show that this trade was contrary to the laws of Portugal; and if it were so, it would not, for this reason, be considered illegal in our courts, and a valid insurance might, nevertheless, have been effected upon it. The plaintiff being domiciled in England, he was to be considered, for the purposes of commerce, as a British subject; and our courts do not regard the fiscal regulations of foreign states. This was a well-known trade; and as the goods are specified in the policy, the underwriters well knew the hazard they were undertaking. They must show, therefore, that the adventure is contrary to the law of this country; and an attempt will be made to do so, on the ground, that there being, at the time, a proclamation in force under 12 Car. 2, c. 4, s. 12, and 33 G. 3, c. 2, s. 4, against the exportation of gunpowder and ammunition, a license was necessary, and no sufficient license was obtained. It was objected, that the license does not at all extend to the shot; but the case finds that this was merely bird-shot, which, from the purposes to which it is commonly applied, cannot be considered ammunition, or warlike stores. As far as concerns the gunpowder, it is said that the license was only conditional, and that the condition on which it was granted has not been fulfilled, as a bond ought to have been entered into

by the plaintiff himself: but Fossett, who executed the bond, may well be considered the merchant exporter, as it was his duty to put the gunpowder "on board the ship in which it was to be exported. The bond was [*193 given in the manner in which this trade is uniformly carried on; for the vendor of the gunpowder, who ships it for exportation, uniformly gives the bond as the merchant exporter. This bond was quite satisfactory at the custom-house, and, as the assured acted with perfect good faith, the court will not look with astuteness to any supposed irregularity, which had no connexion with the loss, and, in no respect, increased the risk of the underwriters.

Puller, contrà. The assured must be considered to have brought about the loss himself, as it was the act of his own government. The goods were taken by Portuguese ships of war, commissioned by the Portuguese government, and condemned by a Portuguese court. [BAYLEY, J. The seizure is by one of the vessels of the Portuguese government; but the condemnation is not the act of an admiralty court.] [ABBOTT, C. J. It is stated to be the supreme court of judicature; but it is not stated that it had jurisdiction in admiralty matters.] He cited *Conway v. Grey*, 11 East, 502. [BAYLEY, J. There the act which caused the loss was the authorized act of the government.] Here the plaintiff is a subject of Portugal, and the loss is occasioned by the act of the Portuguese government, in condemning a ship for the breach of a blockade which they themselves had made. [BAYLEY, J. Here it is not the blockade, but the breach of the blockade, which occasioned the loss.] Another objection to the plaintiff's right to recover is, that part of the cargo consisted of bird-shot, which is not included in the license. Now, although bird-shot be not warlike stores, yet it fairly comes within the description of arms and ammunition. [ABBOTT, C. J. I cannot think that bird-shot can be considered to come within that description.] The great objection, however, in this case to the plaintiff's right to recover is, that the condition upon which the license was granted has not been complied with. The condition is, that the merchant exporter should give the security required by the bond. Now, here, the plaintiff was the merchant exporter of this gunpowder, and not Mark Fossett, who only petitioned for the license on behalf of himself and others. The plaintiff has not given the required security, and consequently the terms of the license have not been complied with. The exportation of the gunpowder was therefore illegal; and the policy, being one entire contract, is wholly void. *Parkin v. Dick*, 11 East, 502.

Campbell, in reply, was desired by the court to confine himself to the objection, that the bond actually executed was not a sufficient compliance with the condition of the license; and he contended, that inasmuch as Mark Fossett, on behalf of himself and others, prayed leave to export, he might be considered as the merchant exporter, within the meaning of the license. If the word *said* had been introduced, there could have been no doubt upon the subject; because, then, it must have referred to Mark Fossett.

Cur. adv. vult.

*ABBOTT, C. J., in the course of this term delivered the judgment of the court. After stating the facts of the case, he proceeded as follows: [*195

The question in the case is whether we can consider Mark Fossett as the exporter of this gunpowder, within the meaning of the license. It appears that he was the manufacturer of the gunpowder, and that he sold it to the plaintiff. It appears, also, from the affidavit accompanying the petition upon which the license was granted, (a) that he was to ship it free on board. Having done that, he then ceased to have any further interest in the adventure. The shipment having been made, the goods were the property and under the control of the present plaintiff: he, therefore, was the merchant exporter, and ought to have given the security required by the license. We have arrived at this conclusion

(a) This affidavit is not set out in the case. It was laid before the court by consent of both parties after the argument.

with great reluctance ; because it appears that in this case there was no intention to violate the law, and that this was the usual mode of carrying on the trade. We, however, feel ourselves obliged to say that the terms of the license have not been complied with : the consequence of which is, that the plaintiff cannot recover, and that there must be judgment of nonsuit.

Judgment of nonsuit.

*REGULA GENERALIS.

Michaelmas Term, 1820.

WHEREAS by the common consent rule in actions of ejectment, the defendant is required to confess lease, entry, and ouster, and insist upon his title only : and whereas, in many instances of late years, defendants in ejectment have put the plaintiff, after the title of the lessor of the plaintiff has been established, to give evidence that such defendant was in possession (at the time the ejectment was brought) of the premises mentioned in the ejectment, and for want of such proof have caused such plaintiffs to be nonsuited : and whereas such practice is contrary to the true intent and meaning of such consent rule, and of the provisions therein contained for the defendants insisting upon the title only : it is therefore ordered, that from henceforth in every action of ejectment, the defendant shall specify in the consent rule, for what premises he intends to defend, and shall consent in such rule to confess upon the trial, that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was at the time of the service of the declaration, in the possession of such premises ; and that if upon the trial the defendant shall not confess such possession as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff, in that case to be taxed.

By the court.

THE END OF MICHAELMAS TERM.



CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Mary Term,

IN THE FIRST AND SECOND YEARS OF THE REIGN OF GEORGE IV.

COWIE and Another v. HALSALL.

A bill of exchange having been accepted generally, the drawer, without the consent of the acceptor, added the words "payable at Mr. B.'s, Chiswell street;" Held, that this was a material alteration, and that the acceptor was thereby discharged.

ACTION by the endorsee against the acceptor of a bill of exchange. The first count of the declaration stated the bill to have been drawn by one S. Daniel and accepted by the defendant, payable at Mr. Bidlake's, 48 Chiswell street. The second count stated a general acceptance. At the trial before ABBOTT, C. J., at the London sittings after last Michaelmas term, it appeared in evidence, that the bill was originally accepted by the defendant generally, and that the words "payable at Mr. Bidlake's, 48 Chiswell street," were not in the handwriting of the acceptor; and the jury, upon a question submitted to them, found specially that the bill was "altered by the drawer without [198] the consent of the acceptor, and ABBOTT, C. J., was of opinion, that such an alteration vitiated the bill, and then directed the jury to find a verdict for the defendant.

Marryat now moved for a new trial, and contended that the defendant was liable upon the general acceptance, and he distinguished this case from *Tidmarsh v. Grover*, 1 M. & S. 735, because the bill, in that case, was originally made payable at Bloxam and Co.'s, and their name was erased and that of Eadale and Co. inserted. The acceptor, therefore, had never undertaken generally to pay the bill, but only to pay it at a particular place, and the alteration was in a special acceptance. Here, however, the party was originally liable by his general acceptance, and that liability still continues. In *Master v. Miller*, 2 H. Bl. 141, where the date of the bill was altered, the liability of the party was changed; and the original contract did not remain as it does here. The whole effect of this alteration is to impose an additional duty on the holder of the bill, but the contract of the acceptor is not thereby changed.

ABBOTT, C. J. It is perfectly clear, that if the circumstance of the bill being made payable at a particular place, be a material part of the instrument, this addition to it by the drawer, without the concurrence of the acceptor, will vitiate it altogether. Now an acceptance is a material part of a bill of exchange; and may be either general or special. By a general acceptance, the acceptor undertakes to pay the bill at any place where he may be called upon. By [199] a special acceptance, he undertakes to pay at the place named in the bill

This alteration made it a special acceptance, to pay the money at Mr. Bidlake's, Chiswell street. Until these words were introduced, the acceptor would be bound to pay the bill at any place. According to the late decision in the House of Lords in the case of *Rowe v. Young*, 2 Brod. & Bing. 165, this forms so material a part of the contract, that unless the bill be presented at that place, the acceptor is not liable at all. I am, therefore, of opinion that the addition made to this bill by those words, was an alteration in a material part of the instrument, and having been made without the privity of the acceptor, the bill thereby became void.

BAYLEY, J. I am of the same opinion. Any material alteration in a written instrument vacates it; and I think this was a material alteration; for it might subject the party to some inconvenience. The holder would present the bill at B., where, of course, under these circumstances, it would be dishonoured; and he might then, after sending by the post notice of the dishonour, immediately sue out a writ, and arrest the acceptor.

HOLROYD and BEST, Js., concurred.

Rule refused.

*SMITH v. THATCHER.

[*200]

When the acceptor of a bill of exchange, having made it payable at Messrs. C. and Co.'s, has not sufficient effects in their hands at the time when the bill becomes due, he is not entitled to notice of its dishonour. Query, whether, in the case of such an acceptance, any notice be, under any circumstances, necessary.

ASSUMPTION by the plaintiff, as drawer of a bill of exchange, against the acceptor; the bill was dated July 25th, 1820, and was drawn for the sum of 300*l.* payable at two months, and accepted by the defendants, payable at Messrs. Coutts and Co. Pleas general issue. At the trial, at the sittings at Westminster, after last Michaelmas term, before **BAYLEY, J.**, the plaintiff proved the acceptance and dishonour of the bill. No proof was given of any notice of dishonour to the defendant, but the plaintiff proved, that at the time when the bill was drawn, the defendant had a balance with Messrs. Coutts and Co., of 712*l.* 13*s.* 3*d.*, and that when the bill became due, this balance had been reduced to 41*l.* 1*s.* 4*d.* Upon this evidence being given, **BAYLEY, J.**, was of opinion, that the defendant was not entitled to notice of the dishonour of the bill, and the plaintiff obtained a verdict; and now,

Brougham moved for a rule nisi to enter a non-suit. In this case the defendant was entitled to notice. It is true, that in *Bickerdike v. Bollman*, 1 T. R. 405, it was determined, that where the drawer has no effects in the hands of the drawee, he is not entitled to notice; but Lord **ELLENBOROUGH**, in *Orr v. Maginnis*, 7 East, 359, held, that if there be any effects of the drawer in the hands of the drawee at the time, it would be very dangerous and inconvenient, merely on account of the shifting of a balance, to hold *notice not to be necessary. Now the principle there laid down applies to this case. Here the acceptor had effects in the hands of Coutts and Co., at the time of his acceptance, sufficient to discharge the bill, and the balance was a shifting one, during the whole of the interval between that time and the time of presentation for payment; and *Hammond v. Dufrene*, 3 Campb. 145, is to the same effect.

ABBOTT, C. J. The case of *Orr v. Maginnis* turned principally upon the want of a protest for non-acceptance of a foreign bill of exchange; and I do not think that the principle now contended for is there laid down with sufficient generality to be applicable to the present case. It may be very doubtful, whether any notice at all be necessary, under any circumstances; for here, the

acceptor having appointed a special place for payment, may, perhaps, be considered as having made Messrs. Coutts and Co. his agents, for the purpose of paying the bill, and then their refusal to pay may be considered as a refusal by him, in which case no notice could be necessary. At any rate, however, in the present case, the want of notice can be no defence, for the defendant had not, at the time when the bill became due, sufficient effects at the place appointed by him for the payment of it. The rule must, therefore, be refused.

Per Curiam,

Rule refused. (a)

(a) See 2 Campb. 503, *Blackham v. Doree.*

Where an attorney for the plaintiff suffered the cause to be called on without previously ascertaining whether a material witness, whom the plaintiff had undertaken to bring into court, had arrived, in consequence of which the plaintiff was nonsuited: Held, that in an action against him for negligence, it was properly left to the jury to say whether he had used reasonable care in conducting the cause; and the jury having found in the negative, the court refused to disturb the verdict.

ACTION against an attorney for negligence. Plea, the general issue. At the trial at the sittings at Westminster, after last Michaelmas term, before ABBOTT, C. J., it appeared, that the defendant had been retained by the plaintiffs, as their attorney, to commence, and prosecute an action against a person of the name of Clarke, for a debt. In support of that case, one Fermin was a material and necessary witness. This person resided at Colchester; and, on the day before the cause was tried, Reece, one of the plaintiffs, who had previously directed the defendant not to subpoena Fermin, being informed by the defendant and his clerk, that the trial would come on the next day, undertook to take care to have Fermin at Westminster at the sitting of the court, and directed the defendant to have the other witnesses ready. He then sent off a special messenger to Colchester for the witness. On the morning of the trial, all the other witnesses were in court, and the defendant then seeing the foreman of Reece there, inquired from him, whether Fermin had arrived, and was informed, that he had not seen him, but that he supposed he was arrived, and that he was getting his breakfast at some adjoining coffee-house. The defendant, upon this information, and without previously sending to inquire at any coffee-house in the neighbourhood, but relying on the assurance of Reece, given the day before, suffered the cause to be called on. The plaintiffs on that occasion were *203] nonsuited, in consequence of Fermin's absence. Fermin arrived in court about an hour afterwards, having, by some accident, been delayed on the road. The lord chief justice left it to the jury to say, whether, under these circumstances, the defendant had used reasonable care and diligence in not previously ascertaining whether the witness had arrived; and in case he had not arrived, in not withdrawing the record. The jury found a verdict for the plaintiffs. And now,

Scarlett moved for a new trial. In this case, the plaintiff Reece himself was the person really in fault; for he had undertaken that the witness should be in court in time to give evidence; there was, therefore, no negligence on the part of the attorney. Besides, at all events, he can only be liable for gross negligence; and here that cannot be said to have been the case; for at the most, it was an error in judgment, in calculating between two evils, viz.: the withdrawing the record, by which the plaintiffs must have sustained a certain loss; and the chance of a nonsuit, in case the witness did not appear, which, from the account given by the plaintiff's foreman, he had no great reason to apprehend would be the case. This cannot, therefore, be considered as gross negligence.

ABBOTT, C. J. It seems to me that it was properly left to the jury to determine, whether there was, on this occasion, reasonable care used by the attorney or not. They have found, that reasonable care was not used, and I cannot say that their verdict is wrong. It was the duty of the defendant not to suffer the case to be called on, unless he had previously ascertained that *all his [*204] witnesses were present; and, at the time when this case came on, it must have been wholly uncertain whether Fermin had arrived. As to the inquiry from the plaintiff's foreman, it was obvious that he knew nothing personally of the matter; and the defendant neglected to make any inquiries at the adjacent coffee-houses, which, if he had done, he would have found that the witness had not arrived: he might, then, have withdrawn the record. There is, therefore, no ground for disturbing the present verdict.

Per Curiam,

Rule refused.

PRUESSING v. ING.

A promissory note for the payment of 30*l.* at three months after date, with interest from the date, requires a stamp applicable to a note not exceeding 30*l.*

DECLARATION on a promissory note, by which the defendant promised to pay to the plaintiff, three months after the date thereof, 30*l.*, *with lawful interest from the date thereof*. At the trial before HOLROYD, J., at the last Middlesex sittings, it appeared upon the production of the note that it was written on a stamp applicable to a 30*l.* note. It was then objected, that inasmuch as the note was given for 30*l.* with lawful interest *from the date thereof* it was in effect a security for 30*l.* and 7*s. 6d.*, three months' interest thereon; and therefore, within the 55 G. 3, c. 184, sched. part 1, was given for the payment of a sum exceeding 30*l.*, and ought to have had a stamp of 3*s. 6d.* The learned judge directed the jury to find *a verdict for the plaintiff, with liberty [*205] for the defendant to move to enter a nonsuit; and

Chitty now moved accordingly, and urged the same arguments as were offered at the trial; and he cited *Cameron v. Smith*, 2 B. & A. 305, to show that where interest is reserved on the face of a bill it forms part of the debt, and therefore may be added to the principal, so as to constitute a good petitioning creditor's debt under a commission of bankruptcy. Here, the interest is expressly reserved on the face of the note, and the sum for which it was made payable is 30*l. 7s. 6d.*, the principal and interest. It ought, therefore, to have had a stamp appropriated to a note given for the payment of a sum of money exceeding 30*l.*; and he also cited *Israel v. Benjamin*, 3 Campb. 40, where this very point came under the consideration of the court, and was not determined.

ABBOTT, C. J. The stamp act imposes upon every promissory note for the payment, at any time exceeding two months after date, of any sum of money exceeding 20*l.*, and not exceeding 30*l.*, a duty of 2*s. 6d.*, and other duties upon other notes in proportion to the sums thereby secured. The object of the legislature was to impose a *pro rata* stamp duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money. The question, therefore, in this case is, what was the sum due at the time when the note was taken? For that is the sum secured. I am quite satisfied that the words "sum of money" in the act, mean the *principal sum mentioned in the note, and not a sum compounded of [*206] principal and interest. A contrary decision would be most mischievous, and have the effect of avoiding many securities; for it has been the constant practice, under similar provisions applicable to bonds in this and former stamp acts, to measure the stamp duty by the principal sum secured, although interest

is always made payable from the date of the bond. I think, therefore, that this rule ought to be refused.

Rule refused.

PITT v. SHEW and Others.

In trespass the declaration was for taking goods, chattels, and effects: *Held*, that the plaintiff might recover the value of fixtures, under these words.

DECLARATION in trespass for breaking and entering plaintiff's dwelling-house, and for taking divers goods, chattels, and effects. Plea, not guilty. The defence relied upon at the trial was, that the defendants entered, on the 14th day of April, 1820, under a distress warrant for half a year's rent due to Evans and Macklew, as the assignees of Adam, a bankrupt; and that, on the 27th day of April, 1820, they sold the furniture, &c.; and that defence was made out in evidence. It appeared, further, that they had taken certain fixtures, the use of which had been demised by the lease under which the plaintiff held. **ABBOTT**, C. J., was of opinion that these fixtures could not be by law distrained. As to the rest of the goods, he left it to the jury to say whether the defendants had sold within a reasonable time. The jury found a verdict for the plaintiff as to the fixtures, damages 57*l.* 10*s.*; and for the defendants as to the other parts of the case.

**Gurney* now moved to enter judgment for the defendant, *non obstante veredicto*, on the ground that the plaintiff was not entitled to recover the value of the fixtures under this declaration, which charged the defendant with taking goods, chattels, and effects; and he cited *Niblet v. Smith*, 4 T. R. 504, where, in replevin for taking goods and chattels, to wit, one limekiln, and avowry for rent in arrear, the plaintiff pleaded in bar that the limekiln was affixed to the freehold, and therefore exempt from distress. To this plea there was a general demurrer; and the court held, that the plea stating that the limekiln to be affixed to the freehold was inconsistent with, and a departure from, the declaration, which treated it only as a chattel. The effect, therefore, of that case was, that fixtures do not come within the description of goods and chattels. So, in *Lee v. Risdon*, 2 Marsh. 495, it was held by the Court of Common Pleas, that an action for goods sold and delivered would not lie for fixtures; and *Nutt v. Butler*, 5 Esp. 176, is to the same effect. Here, the plaintiff had possession of these fixtures under the demise, and the landlord might distrain them for rent.

ABBOTT, C. J. I am of opinion that the value of these fixtures may be recovered under the terms mentioned in the declaration, "goods, chattels, and effects." Fixtures may be taken in execution under a fieri facias, which contains similar words. They are not distrainable, not being severable from the freehold: and, for that reason, not being capable of being restored in the same plight in which they were before *severance. And, for the same reason, **208*] before the statute, 11 Geo. 2, c. 19, growing corn could not be distrained.

Rule refused.

Same v. Same.

A reasonable time after the expiration of five days from the time of distress is by law allowed to the landlord for appraising and selling the goods distrained.

The plaintiff, in person, moved for a new trial, on the ground that there ought to have been a general verdict in his favour; because the defendants had re-

mained upon the premises for too long a period, and had not immediately after the expiration of five days from the time of distress taken, appraised, and sold the goods, pursuant to the 2 W. & M. sess. 1, c. 5, s. 2, and 11 G. 2, c. 19, s. 10.

But the court were clearly of opinion that it was lawful for the landlord, and those acting under him, to remain more than five days upon the premises, for the purpose of selling the goods distrained. By law he could not sell till five days had expired ; and, taking the two acts together, it is clear that it must be left to the jury to say what is a reasonable time, after that period, within which to sell the goods ; and the jury, in this case, having found that the defendants had sold within a reasonable time, there is no ground for disturbing the verdict.

Rule refused.

*HUNTER v. KING.

In an action against an attorney for negligence in the negotiation of an annuity, the party who on the face of the deed appeared to be the grantor is a competent witness to prove it a forgery.

THIS was an action against an attorney for negligence in the negotiation of an annuity. At the trial before HOLROYD, J., at the last sittings after Michaelmas term, Thomas Pike, the grantor of the annuity, was called as a witness on the part of the plaintiff, to prove that the subscription of his name to the deed of covenant to secure the annuity was forged. It was objected at the trial, that without a release from the plaintiff, he was not a competent witness. The objection was overruled, and the plaintiff obtained a verdict ; and now

Denman moved for a new trial. This evidence was improperly received. There is no decision upon the point in any civil case ; but in criminal cases it has been long settled, that a party by whom an instrument purports to be made is not an admissible witness to prove it forged, if he would either be liable to be sued upon the instrument, supposing it to be genuine, or thereby be deprived of a legal claim against another. In Phillips on Evidence, chap. 5, sec. 6, the authorities upon this subject are collected. There is no distinction, in principle, between civil and criminal cases in this respect. Here, if Hunter recovered the whole value of the annuity against the defendant, he never could sue Pike on the deed ; for the verdict obtained in this action would be evidence in such an action, by Hunter against Pike, to show that Hunter had received no damage.

*ABBOTT, C. J. I am of opinion that this evidence was properly admitted. The case of forgery has always been considered an anomaly in the law of evidence. The question, however, in civil cases is, whether the witness has any interest in the verdict. Now, if Hunter brought an action against Pike, the latter could not by plea avail himself of this verdict, because it is *res inter alios acta* ; and if it could not be pleaded in bar, it would not be admissible in evidence in such an action. In actions against the sheriff for an escape upon mesne process, sometimes the whole debt is recovered against the sheriff ; yet, in an action against the original debtor for the debt, he could not plead in bar, or give in evidence, in reduction of damages, the judgment obtained in the action against the sheriff. I am therefore of opinion, that as Pike could not, in an action brought by Hunter against him upon the annuity deed, avail himself of this verdict, he has no interest in it ; and, consequently, that he was a competent witness to prove the forgery.

Rule refused.

TODD v. REID.

An insurance broker is only entitled to receive payment for the assured from the underwriter in money ; and, therefore, a custom to set off the general balance due from the broker to the underwriter in the settlement of a particular loss is illegal.

This was an action by the assured against an underwriter, tried before AB-BOTT, C. J., at the London sittings after Michaelmas term. The only question was, whether the loss had been paid. The assured had employed one Power, a broker, to effect the policy, which he returned to the assured. Some time after the loss happened, the assured sent the policy to him for the purpose of *211] adjusting the loss, and receiving from the *underwriters the amount of their several subscriptions. The policy was adjusted by the defendant, and part of the sum for which he had subscribed the policy was duly paid over to the plaintiff. At the time of settling the loss, the broker was indebted to the underwriter for premiums on other policies of assurance, but to which the plaintiff was not a party, in a sum equal to the residue of the money due on the policy in question ; and this sum was allowed in account between the broker and the underwriter ; and it was contended that this was to be considered as payment to the assured to that amount. It was proved at the trial, that it had been the practice at Lloyd's coffee-house, for many years, thus to settle losses between the broker and the underwriter. The lord chief justice was of opinion that such a usage could not be supported in law, that the broker had only authority to receive payment in money from the underwriter ; and the plaintiff recovered a verdict. The solicitor-general now moved for a new trial, and contended that this money so allowed in account between the broker and underwriter might, in consequence of the usage which had so long obtained at Lloyd's coffee-house, be considered as payment to the assured. If this were not payment, all that the underwriter would have to do, would be, first, to require payment of the balance due to him from the broker in money ; and then to return it to him, together with the residue.

Per Curiam. The broker, as agent of the assured, was only entitled to receive payment in money ; and no usage can sanction such a practice as that which is stated to have prevailed in this particular business. This is, in fact, an attempt to pay the debt of one person with the money of another.

Rule refused.

*212]

*EDWARDS v. DICK.

In an action against the drawer of a bill payable at a particular place, it is no defence that no notice of the dishonour has been given to the acceptor : nor is it any defence that the bill was accepted for a gaming debt, if it be endorsed over by the drawer for a valuable consideration, to a third person, by whom the action is brought.

ASSUMPSIT by plaintiff as endorsee, against the defendant as drawer and endorser of a bill of exchange. The bill was dated December 1, 1819, and was drawn by defendant upon, and accepted by, Lord R., for the sum of 240*l.*, payable at three months, at Mr. Newland's chambers, New Inn. Plea, general issue. At the trial at the sittings after last Michaelmas term, before BAYLEY, J., it appeared that the bill had been duly presented and dishonoured ; but no notice had been given to the acceptor of its dishonour. It was also proved that it had been drawn and accepted in discharge of a debt for money won at play, but that the plaintiff had received it from the drawer in payment of a bona fide debt. The learned judge was of opinion that neither of these circumstances

formed any defence to the present action ; and the plaintiff obtained a verdict. And now

F. Pollock moved (by leave of the learned judge) to enter a nonsuit. First, notice of the dishonour ought to have been given to the acceptor ; for he is primarily liable, and every thing ought to have been done to have enabled the party to have charged him. And, in *Treacher v. Hinton*, which was tried before *Abbott*, C. J., at the sittings after last term, and in *Young v. Rowe*, 2 Brod. & Bing. 165, in the House of Lords, it seems to have been considered that such notice was necessary, in order to charge the acceptor. On the second point, the words of the statute 9 Ann. c. 14, s. 1, are very strong ; for the bill or other security *is thereby, if given for money lost at play, void to all intents and purposes whatsoever. It must be, therefore, as if no bill had [*213] ever existed. For if the present plaintiff be permitted to recover, the bill will not be void to all purposes, but will for this purpose be valid. In *Bowyer v. Hampton*, 2 Str. 1155, such a bill was held to be void in the hands of an innocent holder, who had given a valuable consideration for it. The cases under the statute of usury are similar to the present. Under that act, in *Ackland v. Pearce*, 2 Camp. 599, it was held that a bill of exchange is void in the hands of a bona fide endorsee, if drawn in consequence of an usurious agreement for discounting it, although the drawer to whose order it was payable was not privy to the agreement. He also referred to *Wilmot's Notes*, p. 194, for the general principle upon which statutes are to be construed.

Abbott, C. J. This is an action by the endorsee of a bill of exchange, against the drawer and endorser. The endorsee received the bill for a good and valuable consideration : upon the view of the bill at the trial, it appeared that it was accepted payable at a particular place ; proof was given of a demand at that place, but there was no notice of the non-payment given to the acceptor ; and it is contended, that this is an answer to the present action. The argument, however, assumes that if an action had been brought upon the bill against the acceptor, it would have been necessary to give such proof ; and we have been referred to a case of *Treacher v. Hinton*, where a rule nisi for a new trial was granted, in the course of this term. In that case, however, the plaintiff [*214] *had been nonsuited by me in consequence of no such proof having been given, and the granting of the rule nisi is therefore a proof, if at all, that the opinion of the court is adverse to such an objection.(a) But it would not follow that because the acceptor, if sued, could make such an objection, that the drawer may take advantage of it. For it is quite sufficient if notice of the dishonour be given to the party against whom the action is brought, and he cannot allege the want of notice to a third person. The first objection therefore fails. But a second point has been made in the present case, founded on the provision contained in the statute 9th Anne, c. 14, s. 1, which enacts, that "all notes, bills, bonds, judgments, mortgages, or other securities, or conveyances whatsoever, given, granted, drawn, or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming, &c., shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever." Now this provision is certainly expressed in very large terms. But the object of the statute, to which we must look, in order to arrive at a clear construction of this clause, was to prevent excessive and deceitful gaming ; and it was with that view that they enacted that the securities should be void to all intents and purposes. It is however argued, that if the plaintiff in the present case recover, this bill, the consideration for which was money won at play, will be valid to some purposes. But, I think we must understand the language of the legislature with reference to the object which they then had in view, viz. the prevention of

(a) See page 413 post. the ultimate opinion of the court, &c.

*215] gaming: and that will be effectually accomplished, by holding *the securities to be void for any purpose of enforcing payment of the money won at play. The drawer, therefore, of such a bill of exchange cannot maintain any action against the acceptor. Now if he could, by passing the bill to a third person, enable him to sue the acceptor, that would be within the mischief of the act. It follows, therefore, that no person deriving title through the drawer, can be in a different situation from him so as to sue the acceptor. The case of *Bowyer v. Bampton* falls within this rule; for there the action was brought against the loser, to recover money lost at play, and the court properly held that the action would not lie. The cases on the statute of usury follow the same principle. In the case of *Ackland v. Pearce*, the acceptor, who wanted to borrow money, applied to the drawer, who drew a bill for 386*l.*, which was passed away by the acceptor, for an usurious consideration, and afterwards fell into the hands of a third person, by whom the action was brought against the drawer; but in that case substantially, the drawer and acceptor were the same persons, and the plaintiff claimed in effect, though not in form, through the persons affected by the usurious contract. But there is no case upon the statute of usury, where a drawer, after having parted with a bill for a good consideration, can afterwards set up as a defence an antecedent usurious contract between himself and the acceptor. For if so, a court of justice would enable him to commit a gross fraud upon an innocent person. Upon the whole, I am of opinion, that we shall best effectuate the intention of the legislature, by saying that this bill is void for every purpose which it was the object of the statute 9 Anne, c. 14, s. 1, to prevent. No person, therefore, who derives his title through the *winner, can make the loser pay. But for the purpose *216] of preventing fraud, we cannot permit the defendant to set up his own gaming as a defence; and therefore I think that the words of the statute do not extend to the present case, and that this rule ought to be refused.

BAYLEY, J. In this case, the defendant had notice of the dishonour of the bill; and I am of opinion that he cannot be protected by want of notice to the acceptor, by which he himself could not be prejudiced. As to the second point, I am of opinion that the case does not fall within the purview of the act. Any security by which payment is to be enforced from the loser in case of gaming, or the borrower in the case of an usurious loan, is void; but no such effect can be produced by the plaintiff's recovering in the present action. And it would be most unjust to allow this defence to a defendant, who having endorsed over, and thereby asserted the bill to be valid, afterwards, when called upon to pay it, says that it is invalid, and that in consequence of fraudulent conduct to which he himself has been a party.

HOLROYD, J. I am of the same opinion. The rule of law is, that the words of a statute are not to be construed so as to extend beyond the mischief contemplated by the act, where such construction would be injurious to the interest of third persons. That would be the case here, if we were to hold this to be a good defence; for this being an action against the drawer, the winner of the money, it would be contrary to the intent of the statute that he should be protected, for in that case he would be enabled to keep the money won at play *217] contrary to the intent of the statute. No doubt, in this case, the *acceptance is void; for it was given in consideration of money lost at play. But the consideration given by the present plaintiff when the bill was negotiated was not of that description; and I think the object of the statute will be best answered in the present case, by holding that the words extend only to make the acceptance void. But it is urged, that the words of this statute are imperative, and undoubtedly they are very strong. It has, however, been long settled upon the construction of the 13 Eliz. c. 10, s. 3, as to ecclesiastical leases, that words full as strong as these may be so narrowed as not to extend beyond the mischief contemplated by the act. That statute directs, that "al-

the leases therein specified shall be utterly void and of none effect, to all intents, constructions, and purposes ;" and yet it has been held, that a lease by a dean and chapter, although within the act, is good during the life of the dean ; and even after his death it is not absolutely void, but only voidable, and may be confirmed by his successor. There the courts have looked to the object of the statute, which was to prevent the impoverishing of the successor. So, here, we ought to put a similar construction on the words of the present act ; and by so doing we shall not do an injustice to an innocent party, nor protect an individual whom it was the intention of the statute to prevent from obtaining money by means of gaming.

BEST, J. This is a most iniquitous defence. The defendant desires the court to prevent the plaintiff from recovering ; and, for that purpose, alleges his own fraud in his defence. I am, however, quite satisfied that the view taken of the case at the trial, by my brother *BAYLEY, was correct. The policy of the statute of Anne was to prevent any security given for the payment of a gaming debt, being enforced against the loser ; and therefore neither the drawer, nor any person claiming under him, can maintain such an action as the present against the acceptor. What is said by Lord C. J. WILMOT, to which we have been referred, only applies to cases within the policy of any particular statute. This case, however, is not within the policy of Anne, c. 14. If we were to hold this to be a good defence, we should indeed violate the policy of the statute, by enabling the defendant to keep in his pocket the money won at play ; and, by so doing, we should construe the statute so as to encourage, and not to repress, excessive and deceitful gaming. I think, therefore, that this rule ought to be refused.

Rule refused.

The KING v. CLEMENT.

A court of general jail delivery has the power to make an order to prohibit the publication of the proceedings pending a trial likely to continue for several successive days, and to punish disobedience to such order by fine. Service of an order of such court, calling upon the editor of a newspaper "to answer for contemptuously publishing such proceedings," at the office at which the newspaper was published, is good service within the 38 G. 3, c. 72, s. 12; and the editor not having appeared, the fine was held to be properly imposed upon him in his absence.

A RULE nisi had been obtained in last Trinity term, calling upon the justices of the delivery of the jail of Newgate, to show cause why a writ of *certiorari* should not issue, directed to them, to remove into this court all orders made at the last April session of jail delivery holden for the county of Middlesex, by adjournment, at Justice Hall in the Old Bailey, in the suburbs of the city of London, concerning William Innell Clement,* and also the order contrary to which, it was stated in and by a certain other order made by the said justices, at the delivery of the said jail Newgate, holden for the county of Middlesex, by adjournment, at Justice Hall aforesaid, on Tuesday the 25th day of April last, that the said William Innell Clement did print and publish the trials of Arthur Thistlewood and James Ings for high treason. The following facts were disclosed in the affidavits in support of the rule.

On Monday, the 17th day of April, 1820, Arthur Thistlewood was put upon his trial at the Old Bailey, upon an indictment for high treason ; and Lord Chief Justice ABBOTT, then being one of the justices before whom Thistlewood was tried, before the trial, stated publicly, that as there were several persons charged with the offence of high treason by the same indictment, whose trials were likely to be taken one after another, he thought it necessary strictly to prohibit the publishing of any proceedings of that or any other day, until the whole trial should be brought to a conclusion ; and that it was expected that all

persons would attend to that admonition. The trial of Thistlewood was concluded on Wednesday, the 19th of April, and James Ings was afterwards tried for and convicted of the same offence, on Saturday, the 22d of April. On the Sunday following, the defendant published, in the *Observer* newspaper, a fair, true, and impartial account of the proceedings and evidence publicly had and produced in open court, on the trials of Thistlewood and Ings. The defendant's affidavit further stated, that on Tuesday, the 25th April, he left London, and after visiting several places in the county of Kent, arrived at Feversham on Friday, the 28th April; and that on the following day ^{*220]} he saw in a newspaper an account of the sentences passed on the prisoners; and that he had been ordered by the court to pay a fine of 500*l.*, for a contempt of court, in printing and publishing the account of the said trials. He positively swore, that this was the first intimation he had had of any steps having been taken against him for the alleged offence. He then immediately left Feversham, and arrived in London on Saturday, the 29th April, and was then informed, that on Wednesday, the 26th day of April, the following order had been served at his office in the Strand: "On the motion of Mr. Attorney-General, and on reading affidavits therein mentioned, it is ordered, that William Innell Clement, the printer, publisher, and proprietor of a certain newspaper called the *Observer*, do attend this court on Friday next, the 28th instant, at the hour of nine in the morning, precisely, to answer for unlawfully and contemptuously printing and publishing in the said newspaper the trials of Arthur Thistlewood and James Ings for high treason, pending the proceedings against John Thomas Brunt, and others, who were included in the same indictment with the said Arthur Thistlewood and James Ings, for the same high treasons, contrary to the order of this court, and to the obstruction of public justice."

The Attorney and Solicitor-General, *Gurney* and *Littledale*, now showed cause. The court will not grant a certiorari, to remove the proceedings of an inferior court, unless there appears to have been some irregularity or impropriety in the proceedings of that court. In this case the proceedings were perfectly regular and proper. For the court of general jail delivery had authority ^{*221]} to make the original order, prohibiting the publication of the proceedings. That is established by all the precedents applicable to this subject. In *The King v. Watson*, which was an indictment for high treason, tried in this court in Trinity term, 1817, a similar order was made; and upon a complaint by the counsel for the prisoner, that that order had been disobeyed by the editor of a newspaper, the court asked the prisoner's counsel, whether he made any application to the court upon the subject, and upon his answering in the negative, the court stated, that it was then unnecessary for them to do any thing; but no doubt was intimated as to their power of enforcing the order. And in *The King v. Brandreth and Others*, which was an indictment for high treason, tried before a special commission at Derby, in 1817, there was a similar order made by the court. That order was infringed, and the counsel for the prisoner mentioned the subject to the court, but declined making any application to the court to punish the editor of the newspaper, and, of course, the matter dropped. Besides, a publication, the effect of which is likely to prevent or obstruct the course of public justice, has always been held to be a contempt of the court. In the *Practical Register in Chancery*, page 99, it is stated, that "contempt is a disobedience of the court, or an opposing or despising the authority, justice, or dignity thereof: it commonly consists in a party doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the court." In *Pool v. Sacheverell*, 1 Peere W. 675, the question in the cause was, as to the validity of a marriage; and it ^{*222]} was there held, that inserting an advertisement ^{*in} the public prints, that whoever should discover and make legal proof of the marriage in question should have 100*l.* reward, was a contempt of the court; and the party

procuring it was committed. The lord chancellor, in that case, said, "This tends to the suborning of witnesses, is very dangerous, and not only greatly criminal, but is a contempt of the court, being a means of preventing justice in a cause now depending." That case establishes, that a contempt may be committed by a person out of court, pending a proceeding in court. In 2 Atkins, 471, a motion was made against the printers of the Champion, and the St. James' Evening Post, that they might be committed for publishing a libel against Mr. Hall and Mr. Gardner (executors of John Roach, Esq., late major of the garrison of Fort St. George in the East Indies,) and for reflecting likewise upon Governor Mackray, Governor Pitt, and others, taxing them with turning affidavit-men, &c. in the cause then depending in the Court of Chancery, between Mrs. Roach and the executors. It was insisted that the publishing of such a paper was a high contempt of the court. The lord chancellor said, "There are three different sorts of contempt. One kind of contempt is, scandalizing the court itself. There may be, likewise, a contempt of court, in abusing parties concerned in causes here. There may be, also, a contempt of this court, in prejudicing mankind against persons before the cause is heard. There cannot be any thing of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters." He then mentions a case, where it was held that the printing of a brief before the cause comes on was a contempt; and *upon [223] this he says, "The offence did not consist in printing, for any man may give a printed brief, as well as a written one, to counsel; but the contempt of this court was prejudicing the world with regard to the merits of the cause, before it was heard." Lord HARDWICKE was therefore of opinion, that it was of the utmost importance in proceedings in courts of justice to prevent all prejudice, as far as the court can prevent it, from being excited against the parties before the court, pending the proceedings. Now, nothing could be more prejudicial to parties jointly indicted for a crime, and therefore probably likely to be affected by the same evidence, than that, pending the proceeding, (which necessarily was protracted for several days,) there should be published to the world that evidence which had already produced the conviction of one or two of the parties indicted. This was therefore a contempt, from its tendency to prejudice the minds of the public and the jurors who were to try the other cases; and it comes directly within the law laid down by Lord HARDWICKE. In *Ex parte* Jones, 13 Ves. Jun. 237, Lord ERSKINE fully recognises the authority of these cases; and he says, that "whatever may be said as to a constructive contempt, through the medium of a libel, against persons engaged in controversy in the court, it never has been or can be denied, that a publication not only with an obvious tendency, but with the design to obstruct the ordinary course of justice, is a very high contempt." These authorities establish incontrovertibly, that a publication out of court of any thing contrary to the order of the court, or which is likely to impede the course of public justice in the proceeding then pending in that court, is a contempt. *It is not necessary [224] that the party should be present at the time the fine is imposed. The circumstance of the party having been summoned to attend, and not attending, is sufficient. A high constable or a juror not attending, is frequently fined for their non-attendance. In *The King v. The Sheriff of Middlesex*, Sir T. Jones, 169, the under sheriff disobeyed the order of the court, by refusing to amend the panel of the grand jury. The high sheriff, in consequence, was ordered to attend; but did not, and was fined 100/. The fine having been estreated into the Exchequer, an application was made to this court for a certiorari; but it was refused. It was not, however, insisted that the court had not the power to fine, merely because the high sheriff was absent. Besides, it is clear from the defendant's affidavit, that he knew of the order. It may be said that this proceeding is irregular, because there was no personal service of the order of the

26th April. That objection, however, does not apply here ; because, by the 38 Geo. 3, c. 78, s. 12, it is expressly provided, that " service at the house or place mentioned in the affidavit left at the stamp-office, as the house or place at which such newspaper to which any proceedings civil or criminal shall relate, is printed or published, or intended so to be, of any legal notice, summons, subpoena, rule, order, or process, of what nature whatsoever, or to enforce an appearance in any suit, prosecution, or proceeding, civil or criminal, against any printer, publisher, or proprietor of any such newspaper, shall be deemed and taken to be good and sufficient service thereof, respectively, against all persons named in such affidavit or affirmation, as the proprietor or proprietors, publisher *or publishers, or printer or printers, of the newspaper mentioned *225] in such affidavit or affirmation." Here it is expressly admitted upon the affidavits, that the order was served at the Observer office in the Strand. This statute, therefore, removes any objection on the ground of a defective service.

Denman and Platt, contra. A publication containing a fair and impartial account of the evidence given pending a proceeding does not tend to obstruct the course of public justice. By the constitution of the country, courts of justice are open to the public. If indeed any matter comes before the court in which it is necessary, for the purposes of justice, that particular witnesses should be examined separately ; in such a case, which appertains strictly to the business immediately before them, the court have a right to exclude those parties for that cause ; but they have no power to exclude those to whom that reason does not apply. It would be illegal to shut their doors against spectators. No real obstruction of justice can arise from a publication of a true and faithful account of the proceeding. The public good is to be considered ; and it is for the public benefit that a faithful account should be published of a transaction of which they might otherwise receive only a garbled account from the mouths of individuals. Such a publication has the effect of increasing, as it were, the size of a court of justice. It brings to the knowledge of others, not personally present, the facts as they really exist. In order, however, to show that a publication pending the trial may obstruct public justice, it is said that the jurors who were to try the subsequent cases might be prejudiced by reading the evidence *226] already given. It is the duty, however, of *those jurors to attend during all the trials, in order to be ready when called upon, and in that case they must of necessity hear the evidence given upon each trial, and imbibe all the prejudice likely to arise from the effect of that evidence on their minds. As to the prejudice on the public, it is impossible to prevent those who are present at the trial from communicating to their friends and others the effect of what they have heard ; and it is better that that should be done by means of a correct publication of the proceedings than by a garbled account. It is of great advantage to the prisoner that the proceedings should be published daily ; for if a falsehood sworn to by a witness appear in the public prints the next day, the reading of such evidence may induce a person capable of giving a contradiction to come forward in favour of the prisoner. If the witness himself knows that his evidence will be concealed, until the whole inquiry is concluded, he may give false evidence without any fear of detection ; but if, on the other hand, he knows that his evidence will be published almost immediately, the fear of detection may operate upon his mind, so as to prevent his uttering a falsehood. Publicity, therefore, is most conducive to the due administration of justice ; and that being so, the court had no power to make an order to prohibit that which was not an obstruction, but a furtherance of public justice. If, indeed, they had the power to prohibit the publication for a time, they would equally have the power to prohibit it for ever, or they might even prohibit individuals from communicating in conversation what they hear in court. Assuming, however,

that the original order was lawfully issued, a court of general jail delivery has no means of enforcing obedience "to such an order by fine, for they have [227 no process to bring the parties before them. The order served at the printing-office is in the nature of mesne process, and there is no precedent of such an order having ever issued from a court of this description. They may indeed have the power of bringing before them persons whose presence is necessary to enable them to carry on the business with which they are intrusted, such as a sheriff, a juror, a constable, witness, or a prosecutor; but it does not thence follow, that a court has authority to call before them a person who is a stranger to the whole proceedings; and if this court of jail delivery have such power, it follows that it equally belongs to a court of quarter sessions, or a court-leet. Allowing such a power to inferior courts would be attended with dangerous consequences. The authorities cited on the other side only establish, that the superior courts of Westminster Hall have the power of punishing contempts by process of attachment. There is no instance in which any court of quarter sessions, any court of assize, any court of special commission, have ever summoned a party to answer, and afterwards attached him in his absence, and issued process of contempt against him, because he did not appear. It does not follow, because a court have the means of removing obstructions, that therefore they have a power to issue any order whatever, as to individuals who do not belong to the court, and who are not present. As to the case cited of the sheriff, it is his duty to attend the court, and his absence alone, therefore, is a proper subject of a fine; and if any improper practice has taken place, in the panel of jurors, that would operate as an additional cause of fine; but still it would be imposed upon an individual whose duty it is to attend the court. So a juror summoned to attend may be fined for his absence, [228 or for any act inconsistent with his duty. *The King v. Bushel*, Vaughan Rep. 136, is an authority to show that the court may inquire into the nature of the contempt. The first instance where any order was ever made to prevent the publishing of the proceedings pending a trial was on the impeachment of Lord Melville in 1806; and similar orders were made in *The King v. Watson*, in this court, and in *The King v. Brandreth*, which was tried at Derby. In the two latter cases, there was an infringement of such orders by the editors of some of the newspapers; but no attempt was made to punish the contempt by a fine. If, in this case, the publication had taken place in Surrey instead of Middlesex, the court clearly would have had no jurisdiction to punish the contempt. The next objection is, that this order ought to have been personally served on the defendant, for that is the invariable practice in the superior courts, in cases of attachment. Supposing, however, the service to have been sufficient, the court had no power to proceed to fine until appearance. In *Griesly's case*, 8 Co. Rep. 33, a distinction is taken between contempts committed out of court and contempts committed in court. In respect to the latter, it is said, that the steward of the court-leet may take cognisance of them, and impose a fine; but of the former, the jurors of the leet have power to present them, and assess an amercement.

ABBOTT, C. J. Although I was a party to this act of the court below, I hope I should not be the less willing to rescind what had been done in this case, if I *thought it was improperly done, than I am, where an application is made for a new trial, in case of a misdirection by me. I think [229 it sufficient now to state, that I have heard nothing upon the present occasion, which induces me even to doubt the propriety of what took place in the court below, and, therefore, I think this rule ought to be discharged.

BAYLEY, J. I am of the same opinion. In order to induce the court to grant this application, it must appear that there is a reasonable degree of doubt as to the legality of the order made by the court below. For the object of this application is not to enable the defendant to have a writ of error, but only that

he may ultimately have the opinion of this court on the validity of the order; and, by refusing this application, we do not in fact deprive him of an opportunity of contesting that point in the Court of Exchequer. That ground for the application, therefore, altogether fails. As to the validity of the order, it was contended in argument, first, that the court had no power to make an order prohibiting the publication of these trials pending the proceedings. Now, in order to judge of that, it becomes necessary to consider what the nature of the proceeding was. An indictment had been found against a number of individuals for the crime of high treason, and they were then about to be tried. The whole trial of all these individuals constituted one entire proceeding; for if they had not severed in their challenges, the prisoners would have been tried all at once. In point of fact, however, they did sever in their challenges, and were tried *seriatim*. It could not, therefore, be said that the whole proceeding was terminated, until the last of those prisoners had taken his trial. *Now the

[230] court before whom the trial was about to take place was a court of general jail delivery, and had authority to make any order which they might judge to be necessary, in order to preserve the purity of the administration of justice in the course of the proceeding then depending before them, and to prohibit any publication which might have a tendency to prevent the fair and impartial consideration of the case. On the present occasion, it occurred to the court that it would be of great importance, with a view both to the interest of the prisoners and that of the public, that a publication like the present should be prohibited until after the termination of all the trials; and if this had not been done, many inconveniences might have followed, some of which may be pointed out. By the necessary course of the proceeding, it must inevitably happen that the evidence would be repeated in each trial; and if, upon the first trial, one or more of the witnesses had been of doubtful character, it might have been of the utmost importance to keep them apart from the rest, and to examine carefully whether, upon each successive trial, they continued to give the same account which they did upon the first. Now, all this would be prevented, if, by a publication like the present, such persons were enabled to see a printed account of the trial, and to read over, not only their own evidence, but also that of the other witnesses who had been examined. This would give them an opportunity of explaining those parts of their statement which might be at variance with the other facts proved in the case. But, it is argued, that if the court have this power of prohibiting publication, there is no limit to it, and that

[231] they may prohibit altogether any publication of the trial. I *think that that does not follow. All that has been done in this case is very different; for the prohibition, here, has only been till the whole trial was completed. Supposing, however, that this was a legal order, it is then argued that the defendant was not personally served with the order of the 25th of April, by which he was required to appear on the 28th of April, to answer for his breach of the original order; and that, for that reason, the court had no jurisdiction to impose this fine. The defendant, in his affidavit, only states that he went out of town on the 25th of April; but he does not say that he was not cognisant of the original order of the court, nor does he deny that he went out of town with a view to avoid the consequences of his disobedience to it. But that is not all; for it appears that, on the 26th, the notice was served at the place where his newspaper was published; and, by 38 G. 3, c. 78, s. 12, that is sufficient. Besides, the rule which requires personal service, in order to ground an attachment, is merely a rule of practice, of which every court judges for itself. If the absence of a party be voluntary, he cannot complain that the proceeding has taken place behind his back; for he might have attended, if he had pleased. The defendant does not, in his affidavit, give any reason for absenting himself. As to the question, whether a court of record has a power to fine a party who is not then present before them, but who has

been guilty of a contempt, I entertain no doubt; for, otherwise, his contempt in not appearing before them, would prevent his being punished for the previous contempt of which he had been guilty. It has been said, that the party may be punished by indictment; but that is not always an *effectual remedy; [**232 for then the evil will have been accomplished before any indictment can be tried; and, in such cases, it is fit that the party should be deterred by a speedy punishment. It seems to me, that the court below had authority to make the original order, and to punish the disobedience to it; and that they might proceed to do this in the case of an individual not personally present before them, it being established that he had had legal notice, and that his absence was voluntary. I think, therefore, that this rule must be discharged.

HOLROYD, J. I am also of opinion that this rule ought not to be made absolute. In order to sustain the present application, a reasonable ground of doubt as to the legality of the order, should be presented to the court. None such having been presented to my mind, I think we ought not to grant the certiorari, particularly in a case in which, if the order imposing the fine has been illegally made, the party injured may make his defence in the Court of Exchequer. This was an order made in a proceeding, over which the court had judicial cognisance: the subject-matter, respecting which it was made, was then in the course of judicature before them. The object for which it was made, was clearly, as it appears to me, one within their jurisdiction, viz. the furtherance of justice in proceedings then pending before the court; and it was made to remain in force so long, and so long only, as those proceedings should be pending before them. Now, I take it to be clear, that a court of record has a right to make orders for regulating their proceedings, and for the furtherance of justice in the proceedings before them, which are *to continue in force [**233 during the time that such proceedings are pending. It appears to me, that the arguments as to a further power of continuing such orders in force for a longer period, do not apply. It is sufficient for the present case, that the court have that power during the pendency of the proceedings. This order was made to delay publication only so long as it was necessary for the purposes of justice, leaving every person at liberty to publish the report of the proceedings subsequently to their termination. I am therefore of opinion, that this was an order which the court had the power to make. The next question is, whether the court below had the power to fine. It is perfectly clear, as to the courts at Westminster, that contempts may not only be in the face of the court, but that they may be committed out of the court. In the argument of WILMOT, C. J., in *The King v. Almon*, Wilmot's Notes, 243, he shows clearly that publications libelling the superior courts, may be punished as contempts. The cases cited in argument from ATKYNs, as well as that before Lord ERSKINE, establish, that any thing done either for the purpose of obstructing justice, or which will have that effect, may be punished as a contempt of the court before whom the proceedings are had. Courts inferior to the courts of Westminster, may clearly fine and imprison for a contempt, if they are courts of record, as the Court of Quarter Sessions, and the Court of Oyer and Terminer. Indeed, it is the constant practice for those courts to fine jurors who do not attend. Now, the ground on which a person nominated as a juror is bound to attend, is by reason of his having been summoned, and not merely by reason of his nomination; *for when the service is proved by the officer, the juror is fined in his [**234 absence for his non-attendance. If he can afterwards show that he has not been summoned, he may come to the court and claim relief. That is not the case here, where the party has had an opportunity of being heard; for I think the statute of the 38 G. 3, makes service at the office good service, for this particular purpose. If that had not been so, the party might have applied at the subsequent sessions, and would have been let in to urge any ground of relief or defence that he might have had. As to the argument of this being a dan-

gerous power, it is true that every power may be abused ; but the law and constitution of England, whenever that has been the case, has afforded a remedy for such abuses. An argument derived from the possible abuse, does not prove that the power itself is illegal. I think, therefore that this rule should be discharged.

BEST, J. I was present when the order in question was made : and I have heard the arguments which have now been urged against the propriety of that order. Following the example of my lord chief justice, I shall content myself with saying, that nothing which has occurred in the argument this day, has induced me to doubt for a moment the legality or propriety of this order.

Rule discharged.

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The KING v. The Inhabitants of CHAGFORD.

The power given to magistrates under 35 G. 3, c. 101, s. 2, of ordering the charges incurred during the suspension of an order of removal, to be paid by the parish to which the order is made, is confined to two cases only, viz. the death or removal of the pauper ; and therefore, where a pauper, during the suspension of an order of removal, became irremovable in consequence of an estate descending to him : Held, that such a case was not within the act ; and that the pauper, not having been removed, no order for the payment of any charges incurred during the suspension of the original order of the removal, could be made.

On the 2d December, 1816, two justices, by their order, removed William Endacott, with his wife and children, from Chagford to Staverton, both in the county of Devon. This order was on the same day suspended, on account of the illness of William Endacott. On the 1st of July, 1817, the parish officers of Chagford believing the pauper sufficiently recovered to be removed, the following order was made by the magistrates : " Whereas it is now made appear unto us, the justices within named, and we are fully satisfied that the within order of removal may be executed without danger ; we do, therefore, hereby order the same to be forthwith put in execution accordingly : And whereas it is duly proved to us, upon oath, that the sum of twenty-two pounds, seventeen shillings, and one penny halfpenny, hath been incurred by the suspension of the within order of removal ; we do, therefore, order and direct the churchwardens or overseers of the poor of the parish of Staverton, to which parish the said William Endacott is ordered to be removed, to pay the said sum of 22*l.* 17*s.* 1*d.* to Richard Thorn on demand. Immediately after this order was made, it was ascertained that the pauper was still too ill to be removed, and accordingly on the 7th day of the same month, the justices signed a second order of suspension in the usual form. On the 16th May, 1819, the pauper's father died at Chagford, and by his death two freehold houses in the parish of Chag-

ford, descended *to the pauper, as heir at law. The parish officers of Chagford thereupon ceased to relieve the pauper and his family. On the 7th February, 1820, another order was made, of which the following is a copy ; " Whereas it is now made appear unto us, the justices named in the order of removal, and suspension thereof hereunto annexed, and we are fully satisfied, that such order of removal may be executed without danger ; we do, therefore, hereby order the same to be forthwith put in execution accordingly. And whereas it is duly proved to us, upon oath, that the sum of sixty pounds and nine shillings hath been incurred by the suspension of the said order of removal ; we do, therefore, order and direct the churchwardens and overseers of the poor of the parish of Staverton, to which parish the said William Endacott is ordered to be removed, to pay the said sum of sixty pounds and nine shillings to Richard Thorn, on demand." The pauper was never removed, but on the 18th February, 1820, the appellants were, for the first time, served with the order of removal, and with the several other orders hereinbefore mentioned,

and on the some day payment was demanded of the several sums of 22*l.* 17*s.* 1 1-2*d.* and 60*l.* 9*s.* as the expenses incurred by the suspension. Against these orders, the parish of Staverton appealed, and gave the following notice. "Take notice, that we, the churchwardens and overseers of the poor of the parish of Staverton in the said county of Devon, do intend, at the next Quarter Sessions of the peace, to be holden at the castle of Exeter in and for the said county of Devon, to commence and prosecute an appeal against an order made under the hands of Baldwin Fulford and George Gregory, two of his majesty's justices of the peace in and for the said county of Devon, and bearing *date the 1st July, 1817, so far as the same order directs the churchwardens or overseers of the poor of the parish of Staverton to pay the sum of 22*l.* 17*s.* 1 1-2*d.* to Richard Thorn, as the sum incurred by the suspension of an order of the said Baldwin Fulford and George Gregory, for and concerning the removal of William Endacott and Winifred, his wife, John Endacott, Mary Endacott, and Elizabeth Endacott, their children, from and out of the said parish of Chagford into our said parish of Staverton. And also, take notice, that we, the churchwardens and overseers of the poor of the parish of Staverton, in the said county of Devon, do also intend, at the next Quarter Sessions of the Peace to be holden at the castle of Exeter in and for the said county of Devon, to commence and prosecute an appeal against another order, under the hands of the said Richard Fulford and George Gregory, and bearing date the 7th day of February, 1820, so far as this order directs the churchwardens and overseers of the poor of the parish of Staverton, to pay the sum of 60*l.* 9*s.* to Richard Thorn, as the sum incurred by the suspension of the said order, for and concerning the removal of the said William Endacott and Winifred, his wife, and the said John Endacott, Mary Endacott, and Elizabeth Endacott, their children, from and out of the said parish of Chagford into our said parish of Staverton. The sessions, on appeal, quashed both these orders, subject to a case for the opinion of this court.

Nolan and *Tyrrell*, in support of the order of sessions. The two orders, against which the appeal in the present case is made, can only be supported under the authority of the 35 G. 3, c. 101, s. 2, by which it was *enacted, that in case any poor person removed by virtue of any order of removal, should be unable to travel by reason of sickness, the justices making the order were authorized to suspend the execution of it; and the charges incurred by such suspension, might be directed to be paid by the parish officers of the place to which such poor person was ordered to be removed, in case any removal should take place, or in case of the death of such poor person before the execution of such order. Now, in the present case, neither of these events has happened; for the pauper is neither dead, nor has he been removed; and if the Court do not give a strict construction to the statute, it will be productive of great ambiguity and inconvenience. Besides, in the present case, a very long period of time has been suffered to elapse, without giving to the parish to which the order was directed any notice of its existence. In the interval, they may have lost the opportunity of obtaining evidence as to the pauper's settlement, or of applying to the sessions for an order of maintenance on his relations. It will be contended, on the other side, that this is within the mischief intended to be remedied by the 35 G. 3, c. 101; but the words are expressly confined to two cases only. This, therefore, at all events, can only be considered as *casus omissus*. The notice only mentions the amount of the charges; but, under that, the whole merits of the case may be gone into. *Rex v. St. Mary-le-bone*, 13 East, 51, and *Rex v. Kynaston*, 1 East, 117.

Tancred, contrâ. The act of parliament in question, being a remedial law, ought to be extended to all cases *within the scope and mischief of it: for as penal laws, as, for instance, that of 13 Eliz. c. 10, s. 3, are restrained to cases within the intent of the legislature, so, in like manner, remedial laws ought to be extended. The court will not, in any case, require a no-

gatory act to be done; which would be the case here, if they were to hold, that in order to give the parish a right to recover the expenses incurred, the pauper must be removed, the only effect of which illegal act would be, that he would immediately return back to the parish from whence he was removed. In ordinary cases of removal, an actual removal of the pauper may be necessary; for, till that happens, the appellant parish has sustained no actual grievance. But, in suspended orders, the case is very different. There, the grievance accrues from the time of making the order; and the parish to which the order is made has, in that case, two grounds of appeal: either that the pauper is not settled with them, or that the charges incurred by the suspension of the order of removal, are too great in amount. It cannot, therefore, be necessary, in order to raise the latter question, that any actual removal should be made. Besides the very object of the act was to prevent an improper removal from taking place; and it is expressly enacted, that during the suspension of the order, the pauper should bring no additional burden on the parish. But, if it be decided that, in this case, the order for the payment of the charges is not valid on account of the non-removal of the pauper, the suspension of the order will have brought an additional charge upon the parish. It is true, that the strict literal interpretation of the words is against this view of the case; but so it *was [240] in *Rex v. Everdon*, 9 East, 105, which turned upon the construction of this very act; and yet Lord ELLENBOROUGH there said, after deciding that an order of removal of a pauper might be suspended, though the pauper was not brought before the justices at the time of the order, "This is the plain sense and spirit of the act, though somewhat straining upon the words of it; but no other construction can be put upon them consistently with the general object of the act." And GROSS, J., added, "The letter of the statute is sufficiently plain, according to the common understanding of the words; but that would militate so strongly against the spirit and object of it, that we cannot be governed by the letter, without entirely defeating this very wholesome law." The same inconvenience will occur here; for if the subsequently becoming irremovable during the suspension of the order, is to bring this charge upon the parish, the consequence will be, that parish officers will, in almost all cases, be anxious, notwithstanding sickness, to remove the pauper, lest such a burden should be thrown upon them. There is another objection in the present case, which is, that the notice of appeal only raises the question as to the propriety of the charges. Now, that was fully proved, and is not negatived by the case. In *Rex v. St. Mary-le-bone*, there was an appeal both against the order of removal, and that for payment of the charges during its suspension.

ABBOTT, C. J. In this case we are called upon to put a new construction on this act of parliament, *which was passed in order to prevent a grievance arising from the too great temptation afforded to parish officers by orders of removal, to convey paupers from one place to another during sickness. The second section recites, that poor persons are often passed to the place of their settlement during the time of their sickness, to the great danger of their lives; and it gives a power to magistrates, in order to remedy this inconvenience, of not carrying their order into immediate effect, but of suspending its operation for a time. But then, in order to prevent this from producing any hardship to the removing parish, it provides, that no act done by the pauper during the suspension shall give him a settlement, and empowers the magistrates to order the intermediate charges to be paid by the parish to which the order is made, in case any removal shall take place, or in case of the death of such poor persons before the execution of such order. This power, however, seems to me to be confined to these two cases only, viz. the removal and death of the pauper. Whether or not it would be expedient for the legislature to have provided for the present case, it is not for this court to say. All that we can do is, in determine that the non-removal of the pauper prevents the case from falling

within the act. I should have thought, indeed, that as the order of the magistrates, not being within the act, was altogether nugatory, the proper course for the sessions to have pursued would have been, not to have quashed the order, but to have dismissed the appeal. However, as they have done substantially right, I think their order ought to be confirmed.

*BAXLEY, J. It might, perhaps, be the object of the legislature when [242 this act of parliament was passed to take away from parish officers the inducement of a hasty removal, by giving a power of recovering the charges incurred in all cases, including the present. But they have not said so, and the safest course for the court is to abide by the words of the statute. Besides, in the present case, a very long period has elapsed, during which this order remained suspended, and no notice of it was given to the opposite party. Now, if that notice had been given, (and there are no words in the act that supersede the necessity of it,) it might have enabled the other parish to have made prompt inquiry, and to have ascertained the fact relative to the settlement of the pauper. I think, therefore, that this affords an additional reason for holding that the sessions have come to a right conclusion in this case.

HOLROYD, J. This statute cannot, I think be construed so as to apply to this case: although, probably, the legislature would, if it had occurred to them, have provided for it. The words, used, however, are too express to include the present case. The cases under the statute of Elizabeth, as to ecclesiastical leases, are very different. There the words of the statute, being general, were restrained in construction, so as only to include leases within the intention of the statute; but here the words are particular, and cannot, I think, be extended by construction.

Order of sessions, confirmed.(a)

(a) Best, J., was absent in the Bail Court.

*DEYBEL'S CASE.

[243

The court will not take judicial notice of the local situation and distances of the different places in the counties of England from each other; and therefore, where a return to an habeas corpus stated that the prisoner was found on board a vessel, discovered within eight leagues of that part of the coast of G. B. called Suffolk, to wit, within eight leagues of O., in that county, it was held not to be averred with sufficient certainty, that the vessel was not within four leagues of the coast of G. B., between the North Foreland in Kent and Beachy head in Sussex.

THE prisoner, an impressed seaman, was brought up by virtue of a writ of habeas corpus, directed to the admiral of the fleet at Chatham. The return to the writ stated, that, on the 28th November, 1820, a certain foreign smuggling vessel, called the George, of Flushing, on board of which were divers, to wit, six subjects of his majesty, being mariners, was found and discovered by the commander and crew of his majesty's revenue cruiser, called The Griper, to have been and to be within eight leagues of that part of the coast of Great Britain called Suffolk, that is to say, within eight leagues of Orfordness, in the county of Suffolk, having then and there on board thereof divers large quantities of foreign spirits, tea, and tobacco; that is to say, 1736 gallons of foreign geneva, and 346 gallons, the said geneva and brandy being in 595 casks of less size than 80 gallons each, to wit, four gallons each (the said foreign spirits not being for the use of the seamen belonging to the said vessel, not exceeding two gallons for each seaman,) 700lbs. weight of tea, and 2039lbs. weight of tobacco, the said tobacco being in 35 casks and 25 packets, each containing less than 450lbs. weight, to wit, 34lbs. weight each, not being for the use of the seamen, and the tea and tobacco not having been shipped duly for exportation, as merchandise on board the said vessel, from some port in Ireland. The return fur-

ther stated, that the vessel was liable to forfeiture, and was seized, and that the prisoner, Jacobus Deybel, being a subject of his majesty, and *a mariner and seafaring man, was found on board the said vessel so being liable to forfeiture, and seized, and was, by virtue of the statute in that case made and provided, liable to be stopped, arrested, and detained, for the cause aforesaid, and being so liable, was arrested. It then stated, that being so arrested, &c., and liable, &c., and being fit and able to serve in his majesty's naval service, he was afterwards, to wit, on, &c., carried before A. B. and C. D., two of his majesty's justices of the peace, &c., residing at the port of Harwich, into which port of Harwich the vessel was then and there taken and carried, and upon due proof, as by the statutes in that case made and provided is required, was committed, to answer such information as might be preferred, and being so committed, was impressed, and was for that cause detained.

Laws, Serjt., objected to this return; first, that it did not appear, with sufficient distinctness, that the ship on board of which the prisoner was found, was, at the time, within the limits specified in the 59 G. 3, c. 421, s. 1. That act provides, that if any foreign smuggling vessel or boat, in which there shall be one or more subjects of his majesty, whether mariners or persons pretending to be passengers, shall be found or discovered to have been within four leagues of that part of the coast of Great Britain which is between the North Foreland, on the coast of Kent, and Beachy-Head, on the coast of Sussex, or within eight leagues of any other part of the coast of Great Britain or Ireland, having on board any foreign brandy, &c., such vessel shall be forfeited; and every such subject of his majesty, who shall be found on board such vessel, shall be liable *245] to all the pains and penalties, *&c. in like manner as persons being subjects of his majesty, found on board vessels liable to forfeiture, belonging wholly or in part to his majesty's subjects, are by the previous laws liable. Now it is not stated that the vessel was found within four leagues of the coast between the North Foreland and Beachy-Head, and, for any thing that appears here, she might have been within eight leagues of that part of the coast; all that is stated is, that she was within eight leagues of that part of the coast of Great Britain called Suffolk, to wit, within eight leagues of Orfordness in the county of Suffolk. It is not clear, that there may not be a part of the coast called Suffolk, between the North Foreland and Beachy-Head. And although it is subsequently averred, that it was within eight leagues of Orfordness, in the county of Suffolk, still the court, although they will take judicial cognisance of the different counties of the kingdom, cannot carry that so far as to take judicial cognisance of all the different parts of those counties, and their local situation. *Non constat* but that Orfordness may be some isolated part of the county of Suffolk, situated between the limits in question. He was then proceeding to take some other objections to the return, but the court called upon the other side.

Servis, in support of the return, contended, that as the court would take judicial notice of the different counties of England, of which Suffolk was one, and that as this return stated that the vessel was found within eight leagues of that part of the coast of Great Britain called Suffolk, which is, by the next averment, stated to be within eight leagues of a place in that county, the return was quite sufficient.

*BAYLEY, J. It is quite true, that this court will take judicial notice *246] of the general division of the kingdom into counties, because they are continually in the habit of directing their process to the sheriffs of those counties, and because they are mentioned in a great variety of acts of parliament. But still, I think, that the present return is insufficient. In these cases, the greatest certainty is requisite; for the court must see, distinctly, that the party who is brought up is justly deprived of his liberty. Now the act of parliament says, that a party may be properly detained in custody, if he is found on board a ves-

within four leagues of the coast between the North Foreland and Beachy-Head, or within eight leagues of any other part of the coast. This return does not follow the words of the act of parliament, but states, that the vessel was discovered, not within eight leagues of the coast of the county of Suffolk, but within eight leagues of a place in a part of the coast called Suffolk. Now I cannot say, judicially, that there is no place on the coast between the North Foreland and Beachy-Head, which is called Suffolk, and therefore, if it had stopped there, it seems to me, that this return would have been insufficient. But it is said, that there is an additional averment, stating, that the vessel was discovered within eight leagues of Orfordness, in the county of Suffolk. I have before said, that this court will take judicial notice of the general divisions of counties, but that cannot be extended to the particular parts of counties and their local situation. We know very well, that there are many parts of counties separated from the general body of the county. There is a part of the county of Durham which is situated to the north of Northumberland, and so the parish of Creyke, belonging *to the same county, is surrounded by the North Riding of Yorkshire; and there are many other parts of other counties [247] similarly situated. The court, therefore, cannot judicially know, whether Orfordness, which is averred to be part of the county of Suffolk, may not be an isolated part of it, situated on the coast between the North Foreland and Beachy-Head; and if so, there is nothing on this return to show, that the vessel was discovered within the limits mentioned in the act of parliament. The proper course would have been, to have stated, negatively, that the vessel was found within eight leagues of a part of the coast of Great Britain, not between the North Foreland and Beachy-Head, to wit, within eight leagues of Orfordness, in the county of Suffolk. The present return, however, is insufficient, and the prisoner must be discharged.

HOLROYD, J. I am of the same opinion. The present objection will be valid, unless the court are bound by law to take judicial notice, not only of every county, but of the local situation of every place in any county; and I think that they are not bound so to do. I agree that this allegation, taken altogether, must be taken as a positive allegation, that the vessel was found within eight leagues of a part of the county of Suffolk. For, though part of this allegation is under a videlicet, it is, nevertheless, sufficiently certain. But assuming that to be so, still the court cannot take judicial notice of the local situation of Orfordness. The parish of Swallowfield, which is only six miles distance from Reading, in the county of Berks, is in the county of Wilts; and if in the case of a robbery committed there, it became necessary that the fact, as to its local situation should appear, *it would be necessary to prove that fact [248] upon the trial. So here it was necessary to have stated, that Orfordness was not between the North Foreland and Beachy-Head; and this not having been done, I think that this return is insufficient.

BEST, J. It ought to be quite clear, in a case like the present, that a party detaining a prisoner, has authority by law so to do. It ought, therefore, to appear, on the face of the return, that the case is brought accurately within the provisions of the act of parliament; now that has not been done here. We ought, it is true, to take judicial notice of the counties of England, and of those which are maritime counties, as being noticed in a variety of acts of parliament. But we cannot do this, with respect either to the local situation of the different places in each county, nor of the distances of one county from another. It seems to me, therefore, that we cannot take notice, judicially, either that Orfordness may not be an isolated part of the county of Suffolk, or even if it be part of the body of that county, that it is not within eight leagues of Beachy-Head. I think, therefore, that the objection ought to prevail.

The prisoner was discharged.(a)

(a) Abbott, C. J., had left the court.

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*DOWSON v. LEVI.

The proceedings in an action on the bail bond having been stayed, the defendant pleaded to the original action the general issue, and subsequently a plea of bankruptcy, *puis darrein continuance*. There being no affidavit that the application to stay the proceedings was made on the part of the bail, the court now set aside the latter plea, and restrained the defendant to his plea of general issue, on the ground that when the proceedings were stayed in the action on the bail bond, it was intended that the defendant should only question the validity of the original debt.

READER had obtained a rule to show cause why the plea of bankruptcy, pleaded *puis darrein continuance*, should not be set aside, and the defendant restrained to the plea of the general issue, and pay the costs of the application. It appeared from the affidavits, that in consequence of bail not having been put in and perfected in due time, an assignment of the bail bond had been taken, and an action brought upon it. In consequence, an application, in the usual terms, had been made to the court to stay the proceedings in such action: the court ordered the bail bond to stand as a security, a trial having been lost. The defendant afterwards pleaded the general issue, and subsequently put in a plea of bankruptcy, *puis darrein continuance*.

Milner, showed cause, and contended that the court could not interfere, it being a matter of right on the part of the defendant to put in the present plea; and he cited *Paris v. Salkeld*, 2 Wil. 137. As to the former application to the court, that may have been at the instance of the bail, who must, by the rule of court, have sworn that it was made without collusion with the principal. It ought not, therefore, to bind the principal.

Reader and *Marriott*, *contra*, were stopped by the court.

*250] ***BAYLEY, J.** When the proceedings were stayed upon the bail bond, it is clear that the only question which the court intended to permit the parties to try was, whether the debt existed; for otherwise they would not have interfered so as to relieve the bail. After this application to the favour of the court, the principal, by this plea, evades altogether the question as to the validity of the debt, and obtains relief by a collateral circumstance which has occurred subsequently. It is said that he may have been no party to the former application. If there had been an affidavit to that effect, I should have thought that we were not at liberty to take the plea off the file; but, in that case, we should have relieved the plaintiff by rescinding our former order for staying the proceedings upon the bail bond. As, however, there is no such affidavit, the rule must be absolute.

Rule absolute.

ANDREWS v. PALMER.

Where a case was referred by order of *nisi prius*, and after the reference, but before the making of the award, the plaintiff became bankrupt; *Held*, that this was no revocation of the submission, and that the arbitrator having awarded a verdict for the defendant had done right.

This case, which was an action of *assumpsit*, was referred by order of *nisi prius* in December, 1812; and after the reference, but before the making of the award, the plaintiff became bankrupt. In January, 1813, the arbitrator made his award, and thereby ordered the verdict to be entered for the defendant; two days after which a commission of bankruptcy issued against the defendant, who was thereupon adjudged and declared a bankrupt, and all his estate and effects were duly assigned under and by virtue of such commission. No *further proceedings were had till last Michaelmas term, when the defendant taxed his costs and signed judgment, and took out execution for the amount.

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Bayly now moved for a rule to show cause why the judgment and subsequent proceedings should not be set aside, contending that the assignment under the commission having, by virtue of the statutes of bankrupt, divested out of the bankrupt all his estate and interest in the subject matter of the reference from the time of his bankruptcy, and deprived him of all control over any part of his property, the bankruptcy must, under these circumstances, have operated as a countermand of the submission. He cited Com. Dig. tit. *Arbitrament*, D. 5, where it is laid down, that if there be a submission by a feme sole, who marries before an award made, it will be a revocation; so, if the woman and B. submit on one part, and the woman marries, it will be a revocation as to B.; and 1. Rol. 331, l. 45; Jon. 398 are cited. (a) This is a stronger case than that of a feme sole marrying after the submission, for she divests herself of the control over her property by her own act; but here, the proceedings under the statutes of bankrupt are in *invitum*. In *Tidd's Practice*, 879, 8th edition, there is a case cited from 1 Crompt, 270, where the court refused to grant an attachment for non-payment of money due on an award, because the defendant was a bankrupt and unable to pay it; and supposing the subject matter of the reference to have been the delivery of a horse or the assignment of a term, the bankruptcy, vesting the property in his assignees, would render it impossible for him to have done either the one or the other.

**Per Curiam.* The bankruptcy did not operate as a revocation of the submission. It would not have put an end to the suit which the bankrupt had instituted, nor can it, therefore, put an end to the arbitration founded upon that suit; and if he has commenced an action without having any cause for it, the bankruptcy neither does nor ought to protect him against the consequences of it. Here the arbitrator was of that opinion, and his judgment is right. In the case of the feme sole, her marriage is a revocation; for it is in law a civil death of all her rights: but bankruptcy does not produce that effect.

Rule refused.

(a) See *Charaley v. Winstanley and Wife*, 5 East, 266.

HOLT v. BRIEN.

Where a husband, not separated from his wife, makes an allowance to her for the supply of herself and family with necessaries during his temporary absence, and a tradesman, with notice of this, supplies her with goods, the husband is not liable for the debt.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial at the last Spring assizes for the county of Devon, before Wood, B., it appeared, by the plaintiff's case, that the defendant was a surgeon on board one of his majesty's ships of war, and that his wife and four children lived at Plymouth, whilst he was absent at sea; that during that time, the plaintiff, who was a butcher, supplied his wife with meat, to the amount of 15*l.* and upwards. It also appeared, that after the defendant returned, he promised to pay the bill, provided he was not arrested. For the defendant, it appeared that he had been arrested by the plaintiff, and that before these goods were supplied the plaintiff had been distinctly informed that he was not to trust the defendant's wife again, and that if he did, the defendant *would not pay the bill; he was also informed, that the defendant allowed his wife an annual income of 100*l.*; that the plaintiff himself had said, that when the wife applied to him, she induced him to trust her, by promising to pay him out of her quarterly allowance. It appeared, also, in evidence, that this allowance had been punctually paid. The learned judge told the jury, that as there was no proof of any separation between the defendant and his wife, nor any separate mainte-

nance settled upon her by deed, the defendant must be considered as liable for all debts contracted by his wife for the necessary support of herself and children ; and he left it to the jury to say, first, whether the goods in question were necessary, and, secondly, whether by the subsequent promise the defendant had not adopted the debt. Under this direction, the jury found a verdict for the plaintiff. A rule nisi for a new trial, on the ground of a misdirection on the part of the learned judge, having been obtained in last Easter term,

Pell, Serjt., and Adam, showed cause, and contended, that the learned judge's direction was correct. A husband cannot, by law, leave his wife in a situation so as to be deprived of the necessaries of life ; and although, in this case he made her an allowance, yet it might be reasonably left to the jury to consider whether such allowance was sufficient for the support of the wife and four children. But, at all events, in this case there is a subsequent promise to pay the bill ; and although the party chooses to annex a condition to it, which was not complied with, yet, inasmuch as he had no right to *annex such a condition, the non-compliance with it is immaterial.

*254] *Cusberd, contrd.*, was stopped by the court.

BAYLEY, J. It appears to me, that this case has not been properly left to the jury, and that there ought to be a new trial. If a husband makes no allowance to his wife, he gives to her a general credit, and she may contract debts, for the necessary supply of herself and family, for which he will, ultimately, be liable ; but that proceeds on the ground that, in such a case, she is to be considered as his agent in contracting the debts. But if he supplies her with a sufficient allowance for the purpose of paying for these necessary supplies, and the tradesman with whom she deals has notice of it, and afterwards trusts her, he does so at his own peril and will only be entitled to recover by proving that, in fact, the allowance was not regularly supplied. In this case, however, the learned judge told the jury that, in his opinion, the husband was liable, because there was no separation between him and his wife, nor any separate maintenance secured to her by deed. But I think that, in so stating it, he did not lay down the law correctly to the jury. Then, as to the subsequent promise, if the husband was not originally liable, but was contracting an obligation *de novo* with the creditor, the latter must take it on the terms on which it is offered to him. Here it was a conditional promise, that he would pay if he was not arrested, and I think that the creditor cannot reject this condition ; for the promise, in this case, did, as it seems to me, create a new obligation. *I think, therefore, that there ought to be a new trial.

*255] *HOLROYD, J.* I am of the same opinion. If a husband supplies his wife with money sufficient for the purchase of necessaries, he is not liable for any debt contracted by her for necessaries to a party who has notice of the allowance. Here the plaintiff had express notice of that fact, and trusted the wife on her own promise, to pay out of her quarterly allowance ; and although that was not binding, in point of law, upon her, still it shows, that the credit was given expressly to the wife, in which case the husband is not liable, according to the authority of *Bentley v. Griffin*, 5 Taunt. 356, and *Metcalf v. Shaw*, 3 Campb. 22. As to the second point, if a fresh demand is created by a promise which is conditional, the condition must, of course, be complied with. I am, therefore, of opinion, the verdict in this case was wrong.

BEST, J. The acknowledgment, in this case, was left to the jury, as an unconditional acknowledgment by the defendant ; but I think the learned judge should not have left it to the jury at all ; for as the condition had not been complied with, the promise was altogether at an end. Upon the other point, I also entirely agree with the rest of the court. The ground upon which a husband is liable for debts contracted by his wife is because she is supposed, in contracting them, to act as his servant or agent. But here the allowance made to her, the notice of it given to the plaintiff, and his conduct thereupon, clearly

show, that, as to him, her agency, in this respect, was countermanded. I am, therefore, of opinion, that the rule for a new trial ought to be absolute. [**256]

Rule absolute.(a)

(a) Abbott, C. J., had left the court.

JELLIS, Assignee of ROUTLIDGE, a Bankrupt v. MOUNTFORD.

A creditor of an insolvent trader may, after the debtor's discharge under the 53 G. 3, c. 102, take out a commission of bankruptcy against him; and his debt, although included in the insolvent schedule, will be a sufficient petitioning creditor's debt at law to support the commission.

ASSUMPSIT for money had and received to the use of James Routlidge, before he became bankrupt; there was also a count for money had and received to the use of the plaintiff as assignee of Routlidge. Plea, general issue. The cause was tried before ABBOTT, C. J., at the sittings after Trinity term, 1818. The jury found a verdict for the plaintiff, damages 121*l.* 3*s.* 5*d.* subject to the opinion of this court on the following case:

In September, 1813, James Routlidge, being a trader within the bankrupt laws, committed an act of bankruptcy. The defendant, on the 2d November in the same year, knowing that Routlidge was insolvent and was then keeping out of the way of his creditors, issued a fieri facias against his effects, under which they were sold, and the proceeds of them, to the amount of 121*l.* 3*s.* 5*d.*, paid over to the defendant in the course of that month. He, however, upon some of the other creditors threatening to make Routlidge a bankrupt, agreed to bring that money into the general fund for the benefit of the creditors, and to take a deed of assignment of all his estate and effects, which, accordingly, on the 15th July, 1814, was prepared and executed by *Routlidge to [**257] defendant and one Frederick Nicholson in trust for themselves and such other creditors as should, within two calendar months, come in and execute the same. This deed was executed by the defendant and some of the other creditors, but not by the plaintiff, and no evidence was given upon the trial to show that the plaintiff ever had notice of the assignment till after the expiration of the two months. On the 11th June, 1815, Routlidge, having been arrested by one Chambers, a creditor, went to prison for want of bail, and after having remained there above three months, petitioned the court for the relief of insolvent debtors to be discharged. He was, accordingly, on the 19th January, 1816, discharged out of custody by the authority of that court, according to the provisions of 53 G. 3, c. 102, and the 54 G. 3, c. 23. On that occasion he entered into the recognisance required by the 14th section of the latter act. In his petition he stated that he had no property except certain debts and effects made over by him (subsequently to the levy of 2d November, 1814, but prior to his imprisonment) to the trustees named in the said deed of assignment, for the benefit of his creditors; no mention, however, of the said levy or of the money arising therefrom, was made in the petition, or schedule, or in the assignment executed by him upon his discharge from custody under the insolvent acts. The schedule annexed to Routlidge's petition set forth the debts, both of the plaintiff and the defendant, and they both had due notice of the application made for his discharge, but neither of them, in anywise, interfered in it. Shortly after his discharge under the insolvent acts, the plaintiff, by his attorney, applied, without success, to the defendant and to the defendant's *attorney (then holding the deed of assignment) for permission to sign the same. In July, 1816, a commission of bankrupt issued against Routlidge on the petition of the plaintiff, upon the debt specified to be due to him in the schedule of Routlidge's petition, and the plaintiff was appointed assignee under that com-

mission. This action was brought to recover the proceeds of the sale under the execution of the 2d November, 1813.

West, for the plaintiff. The only question in this case is, whether there was a good petitioning creditor's debt to support the present commission ; and this will depend on the circumstance, whether the debt of the plaintiff was discharged by the proceedings under the insolvent debtor's act. But the discharge spoken of throughout that act is only a discharge of the insolvent from custody, but not a discharge of him from the debts. By the first section of 53 G. 3, c. 102, the prisoner is to pray to be discharged out of custody, and to have future liberty of his person ; and by section 10, he is to be discharged from custody, and judgment is to be entered up against him, which, by order of the court, may be executed against his future effects, &c. By section 29, if again arrested, he is to be discharged by a judge, on entering a common appearance. These different provisions all show that the only thing intended by the 53 G. 3, c. 102, was to discharge the person of the insolvent, but not to extinguish the debt of the creditor. It is true, that by the 32d section a general plea is given by the insolvent against any action brought for any debt included in his schedule, and from which he has been discharged ; but this section does not *259] extinguish the debt itself. All that is done by it, is to "change the nature of the remedy from an action for the debt, to a proceeding under the judgment entered up in the insolvent court. The words of the insolvent act are very different from those of 5 G. 2, c. 30, s. 7. By that act it is provided, "that every such bankrupt shall be discharged from all debts due or owing at the time he did become bankrupt;" but the 53 G. 3, c. 102, contains no such provision. It, indeed, takes away the remedy by action, but leaves the debt not extinguished. Besides, in this case the objection is taken, not by the bankrupt, but by a third person, who is seeking to overturn this commission : he cannot take advantage of such an objection. If the insolvent does not plead his discharge, he will be liable for the debt ; and *non constat* that he will plead it. In *Quantock v. England*, 5 Burr. 2828, it was held that a third person could not object that the petitioning creditor's debt had been barred by the statutes of limitations ; and Lord MANSFIELD there said that the statute of limitations did not destroy the debt, but only took away the remedy ; and that, for that reason, although the bankrupt might take the objection, no other person could do so. And in *Bickerdike v. Bollman*, 1 T. R. 405, the same principle was recognised. If any inconvenience be felt by the bankrupt, he may apply to the lord chancellor to supersede the commission. This, therefore, is a good petitioning creditor's debt, as against the defendant in the present action.

Laws, Serjt., *contra*. In order to constitute a good petitioning creditor's debt, it must be a legal debt, and one which the creditor has the power to enforce by a legal remedy. This case must, therefore, be tried by *that test. Then, is this debt of that description ? By the insolvent act, all the property of the prisoner is first vested in the provisional assignee till another assignee is chosen : after that has taken place, the assignee appointed by the creditors takes it for the purpose of general distribution. The insolvent, then, after being discharged out of custody, pursuant to 54 G. 3, c. 23, s. 14, enters into a recognisance to the king for the full amount of the debts included in his schedule, which recognisance is to be put in force, if necessary, against his future effects. Upon this recognisance alone can the creditors, who are named in the schedule, afterwards proceed ; for if any of them choose to bring an action, or arrest the insolvent, he may, by the 29th section, be discharged with costs, on entering a common appearance ; and, by the 32d section, he may then plead his discharge in bar of the debt. Here, the petitioning creditor's debt is named in the insolvent's schedule, and he was discharged generally. There is, therefore, no legal mode of enforcing payment of this debt. If so, then according to the principle laid down as the criterion, this cannot be a good petitioning

creditor's debt. That this is the true principle appears from the judgment of Lord ELDON, in *Ex parte Dewdney*, 15 Ves. jun. 498, where he says, "A commission of bankruptcy is nothing more than a substitution of the authority of the lord chancellor, enabling him to work out the payment of those creditors, who could, by legal action or equitable suit, have compelled payment." Here the petitioning creditor could not have compelled payment; and Lord ELDON afterwards adds, "The lord chancellor, in the distribution, is to govern himself, as to legal debts, by the rules of law, and as to equitable debts, [261 by the rules of equity, regarding the claim of each creditor as a suit depending. That is the general principle; and I see no reason for holding that it is not competent to the bankrupt to take this objection, and if he waves it, to creditors." This seems to decide the present case; and *Horsley's case*, Moseley, 37, cited in *Quantock v. England*, is exactly in point. And though Lord MANSFIELD doubted its authority, the subsequent judgment of Lord ELDON accords with that case. *Cohen v. Cunningham*, 8 T. R. 123, is an authority to show, that a judgment creditor, who has taken his debtor in execution, cannot afterwards sue out a commission of bankrupt upon the same debt. If the regulations of the insolvent act and the bankrupt law are inconsistent, then, as both cannot operate, that which has the priority must prevail. Unless that be so, the greatest inconvenience will follow. After the insolvent's assignee has received from the debtors, and paid to the creditors, a commission of bankruptcy may issue, founded on the three months' lying in prison; and then all the debtors may be compelled to pay their debts over again, and the assignee will be compellable to refund the moneys paid by him to the creditors. Under such circumstances, no one could be safe. And the case of the insolvent would also be hard; for, by the recognisance, his future effects are liable; and yet the commission would sweep away all his subsequently acquired effects. These inconveniences show that the court ought not to adopt such a conclusion as the plaintiff contends for on the present occasion.

West, in reply, was stopped by the court.

**ABBOTT*, C. J. It appears to me, that the single question in the case [262 is this,—was the bankrupt, at the time when the commission issued, indebted to the petitioning creditor? Unquestionably that debt, at one period, did exist; and the only point to be considered is, whether by the operation of the insolvent debtor's act, it was subsequently extinguished. For if it was so extinguished, the commission cannot be supported; but if not, it still remains a debt; and we, sitting in a court of law, must pronounce the commission founded upon it to be valid. In the course of the argument many inconveniences have been pointed out to us, with which the issuing of a commission of bankrupt, in a case like the present, might be attended; but we ought not to forget that, in all cases, it is in the power of the lord chancellor, by superseding the commission, to remedy those inconveniences. And, on the other hand, it may be observed, that there are also many cases where, notwithstanding a party's discharge under the insolvent debtors' act, it may be of the utmost importance, for the benefit of his creditors, that a commission of bankrupt should issue; for the assignee under it has a much more extensive power of recovering the effects of the bankrupt than is given by the insolvent debtors' act. All these respective inconveniences and advantages may be presented to the consideration of the lord chancellor; but we, in a court of law, have only the power to determine whether the petitioning creditor's debt be sufficient, and not to enter into the question, whether a commission ought or ought not to issue. The proper course for us to pursue, is, therefore, to inquire only, whether the insolvent debtors' act contains any provision which extinguishes the debt. Now, if the legislature had intended to extinguish it, one word *would have been sufficient; [263 but no such word is found in the act of parliament. On the contrary, for all purposes of obtaining relief and ultimate payment, in common with the

rest of the creditors, the debt is still recognised as in existence. I am, therefore, of opinion that the debt was not extinguished, and that it was one upon which a commission of bankrupt might properly be founded.

BAYLEY, J. I am of the same opinion. It seems to me, that the petitioning creditor's debt was not so far discharged, by the operation of the insolvent debtor's act, as to deprive him of the right of suing out a commission founded upon it. At the time when the debtor applied for his discharge under the act, it is clear that the plaintiff was at liberty to sue out a commission. The debtor was afterwards discharged, and, in his schedule, this debt of the petitioning creditor was inserted; and therefore the debtor would have the benefit given, to which he was entitled under the insolvent act. Now the effect of that act is no more than this, viz. preventing the person discharged from being afterwards kept in custody, for any debt included in his schedule. If, therefore, he be arrested, he may, by s. 29, be discharged, and the creditor compelled to pay costs. And again, by s. 32, the creditor is deprived of any remedy for his debt by action. The act, however, is altogether silent as to any other remedy, and does not prohibit the suing forth of any commission of bankrupt. It is to be recollect, that an insolvent debtor applies to the court for specific relief. The consequence of his having previously committed an act of bankruptcy, may, it is true, render ineffectual all that has been done subsequent to his discharge. But we must recollect, that at all events, it is quite clear, that the discharge has no operation as "against creditors not named in the schedule. Any of those creditors, therefore, might lawfully sue out a commission; and then the same effect would take place, and all the property of the insolvent would vest in the assignees appointed under that commission. Now, to prevent this inconvenience, which would be still greater than those suggested, it seems to me that the creditors named in the schedule ought to have the power of suing out a commission; for they cannot be sure that the creditors not named may not afterwards make their whole proceedings void. Besides, as my lord chief justice has already pointed out, their remedy under the bankrupt laws is much more extensive than under the insolvent act. The circumstances of this case demonstrate it; for this defence is set up by a person upon whom the bankrupt laws have an operation, but who cannot be reached by the provisions of the insolvent act. Here, the payment of the money to the defendant was void under the bankrupt laws; and the petitioning creditor finding that he cannot set it aside under the insolvent act, has obtained a commission, and is seeking to distribute the proceeds amongst all the creditors of the bankrupt. I am, therefore, of opinion that the petitioning creditor's debt still existed, and that the plaintiff is entitled to our judgment.

HOLROYD, J. I am of opinion, that this was still a subsisting debt at the time when the commission issued, and that it constituted a good petitioning creditor's debt. By the 10th section of the 53 G. 3, c. 102, on the discharge of the debtor from custody, a judgment is to be entered up against him for the amount of the debts in his schedule, which, however, is not to be executed, except by order of the insolvent court. *Then come the 29th and 32d sections, by the former of which he is to be discharged, if arrested; and by the latter is allowed to plead his discharge by the insolvent court, in bar of any action for a debt included in his schedule. Undoubtedly that section contains the expression that he may plead it in discharge of the debt. But, taking the whole act together, I think it does not amount to an extinguishment of the debt; because the judgment spoken of in the 53 G. 3, c. 102, and the recognisance to the king substituted for that judgment by 54 G. 3, c. 23, both remain in force for the benefit of the creditors, and cannot be satisfied until the debts mentioned in the schedule are all discharged. Although, therefore, the insolvent debtors' act may be a bar to any action, yet the creditor is not thereby deprived

of all legal remedy. I am, therefore, of opinion that this was still an existing debt, sufficient in a court of law to support the present commission.

BEST. J. The question here is, whether the debt was extinguished by the discharge under the insolvent act. I think it is impossible that that should be the case, when by the act it is to be kept alive for various purposes. The only object of the act was to protect the insolvent debtor, after his discharge, from being arrested again for the debt. The case of *Quantock v. England*, 5 Burr. 2628, seems to me an authority in point. In *Ex parte Dewdney*, 15 Ves. 498, the objection that the debt was barred by the statute of limitations, was taken by the assignees acting for the creditors at large; but there is no case which can be cited where such an objection can be taken by a stranger, which is the case here. I think, *therefore, that we ought to give judgment for the plaintiff. [266]

Judgment for the plaintiff.

JOURDAIN v. WILSON.

A covenant by a lessor to supply the premises demised, (which were two houses,) with a sufficient quantity of good water, at a rate therein mentioned for each house, is a covenant that runs with the land, and for the breach of which the assignee of the lessee may maintain an action against the reversioner.

Covenant by the assignee of the lessee against the reversioner. By the lease two messuages were demised. The breach assigned was upon the following covenant: "And the said William Inwood, the landlord, for himself, his executors, &c., doth covenant, promise, and agree to and with the said lessee, his executors, &c., to supply the said two messuages or tenements and premises with a sufficient quantity of good water, at the rate of three guineas per annum for each house." To this declaration there were several pleas, to some of which the plaintiff demurred; and the question argued was, whether this covenant ran with the land.

Platt was to have argued in support of the demurrer, but the court called upon

E. Lawes, contrd. This covenant does not affect the land demised, for the lessor does not covenant to lay the water on by pipes, but merely to supply the house with water, and the covenant would be satisfied by his carrying the water there in buckets. In *The Mayor of Congleton v. Pattison*, 10 East, 130, *BAYLEY*, J., says, "In order to bind the assignee, the covenant must either affect the land itself during the term, such as those which regard the mode of occupation, or it must be such as *per se*, and not merely *from collateral circumstances, affects the value of the land at the end of the term;" [267] and he afterwards says, "where the value of the reversion is only altered by collateral circumstances, the covenant will not bind the assignee of the land." In *Spencer's case*, 5 Coke, 17, it is laid down, "If a man demises a house or land for years, with a stock or sum of money, rendering rent, and the lessee covenants for him, his executors, &c., to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant; for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only; and therefore, as to the stock or sum, the covenant is personal, and shall not bind the assignee." If the water, therefore, in this case had been like the stock, a permanent and subsisting chattel, yet the covenant would not bind the assignee, because the rent does not issue out of it: and this case is still stronger; for here there is no rent in respect of the water, but a collateral sum reserved.

It is clear, therefore, that the assignee of the lessee would not be bound to pay for the water, and it is reasonable that he should not take the benefit of the covenant. He also cited *Collison v. Lettsom*, 6 Taunt. 224, and *Coker v. Guy*, 2 Bos. & Pul. 565.

ABBOTT, C. J. By this lease the lessor covenants to supply the messuages and tenements demised with a sufficient quantity of good water at the rate of three guineas per annum for each house. The lease does not specifically point out the particular mode by which the water is to be supplied: whether by pipes, [268] by collecting *the water in cisterns, or by carrying it to the premises by buckets; but it is quite clear, that the covenant cannot be satisfied unless a sufficient quantity of good water is brought upon the premises during the term. This is, therefore, a covenant which respects the premises demised and the manner of enjoyment, and I have no doubt, therefore, that it is a covenant which runs with the land, and that the assignee may sue the reversioner for the breach of it.

Judgment for the plaintiff.(a)

a) [See 10 East, 139, (Day's ed.) *in nosis*; Wilmot, 342, *Bally v. Wells*; 2 Selw. N. P. 424 —433.]

The Mayor, Aldermen, and Burgesses of the Borough of READING v. CLARKE.

Declaration in assumpit, charging that defendant was indebted to the plaintiff in 500 quarts of wheat for tolls, without stating any value, is bad upon special demurrer.

THE declaration stated that the defendant was indebted to the plaintiffs in divers, to wit, 500 quarts of wheat, 500 quarts of barley, 500 quarts of oats, 500 quarts of tares, 500 quarts of beans, and 500 quarts of peas, &c., due and of right payable by the defendant to the plaintiffs, as and for certain tolls of wheat, barley, oats, tares, beans, and peas, before that time brought into the borough of Reading, by the said defendant, to be sold, and being indebted, defendant undertook, &c. To this declaration the defendant demurred, and assigned for cause, that although it was alleged in the declaration, that the defendant was indebted to the plaintiffs in divers quarts of wheat, barley, oats, tares, beans, and peas, yet it was not stated, whether the same was of any or what value in lawful money of Great Britain, or that the defendant was indebted to the plaintiffs in any sum of money whatever.

*Carter, in support of the demurrer. Indebitatus assumpsit will not [269] lie for goods and chattels, unless the value be stated. Indebitatus assumpsit will only lie where debt lies; and although in some old cases it is laid down, that debt may be maintained for goods and chattels, it must be done in the detinet only, and the judgment is the same as in detinue. If this form of action can be supported, how is a defendant to pay money into court on a tender, or to avail himself of a set-off. All the precedents of declarations in debt, to recover foreign money, state the value. In *Ward v. Harris*, 2 Bos. & Pul. 265, the declaration stated, that, in consideration that plaintiff had sold to the defendant a certain horse of the plaintiff, at and for a certain quantity of oil, to be delivered within a certain time, which had elapsed before the commencement of the suit; the defendant promised to deliver the said oil accordingly. Lord ELDON, there, was of opinion, that this declaration was bad for uncertainty, even after verdict, inasmuch as neither the value of the horse nor the oil was stated, nor any thing with respect to the quantity or quality of the oil. He says, "In the case of a sale for money, as the law implies that so much money shall be paid as the article is worth, no dispute can arise concerning the quality of what is to be received; the quality of money being always the same. I in-

cline, therefore, to think it is necessary to express value in some manner, in such a contract as this, where something other than money is to be given for a commodity." In that case, indeed, the court were of opinion, that the objection was cured by verdict, but it never was doubted that the objection was bad upon demurrer.

**Bayly, contra.* The reason for inserting the value in debt for corn or other goods, is, that in that form of action the judgment is, to recover the goods themselves, and if not, the value of them. *Paler v. Hardyman*, Yelv. 71. In assumpsit, however, damages only for the breach of the contract are recoverable; the value, therefore, of the goods, which are the subject of the contract, is wholly immaterial, the whole being to be recovered in damages, and the value of the goods is frequently not the measure of the damages; when it is, it may be proved, to ascertain the amount under the averment, that plaintiff has sustained damage to such a value, at the end of the declaration. Where it is not, as upon a contract for the delivery of medicines to be used in the cure of a horse, by reason of the non-delivery of which the horse died, it would be nugatory to state the value of the goods, which would not ascertain, at all, the amount of the damage. And so it would be, upon a contract to deliver 20 quarters of wheat at a future day, without any stipulation as to value. It would be false to say, that defendant undertook to deliver wheat of such a value, when he undertook to deliver it absolutely, without any regard to value, and was bound to deliver it at the time, whatever might be its value. Neither of the cases cited on the other side is in point, neither one nor the other having been decided upon the ground that the value was necessary. To determine, therefore, that it must be inserted, is not required by the cases, and can answer no good end whatever, all the purposes of justice being just as well answered without it.

Per Curiam. The value here is the measure of the damages; and the constant practice, in such an action **as this*, has been, to state the value of the goods. Even in trover, and trespass for taking goods, the value is always stated. So, too, in the case of debt for foreign money or for fines. Unless, indeed, the article in respect of which the party is stated to be indebted, be of some value, there is no consideration for the subsequent promise. The objection, in this case, being taken upon special demurrer, must prevail, and consequently, there must be judgment for the defendant.

Judgment for defendant. (a)

(a) [No the declaration must show the cause of the debt. A count in assumpsit stating merely that the defendant, being indebted to the plaintiff, in a certain sum, assumed, &c., is ill on demurrer, after verdict, and on error. *Cro. Jac. 206, Woodford v. Deacon*; *ibid. 214, Buckingham v. Costendine*; *ibid. 642, Mayor v. Harre*; *Poph. 178, per Doderidge, J.*; *Cro. Car. 31, Foster v. Smith*; *1 Show. 347, Potter v. James*; *Comb. 187, S. C.* This rule, however, does not hold where the debt is stated merely as inducement. *Cro. Jac. 336, Thorne v. Fuller*; *ibid. 548, Austen v. Bewley*; *Heth. 106, Holmes v. Chenie.*]

The KING v. The Bailiffs and Corporation of the Borough of EYE.

A by-law of a corporation directed that upon the happening of any vacancy in the number of 24 common councilmen, such vacancies should be filled by the freemen inhabiting the town; and that a court should be holden once every year, at which it should be lawful for the bailiffs to admit to the freedom of the town such persons as had been resident therein for one whole year: *Held*, that this by-law did not give to every person who had been so resident for that period, an absolute right to be admitted to the freedom of the borough; and the court refused a mandamus to the bailiffs to admit such a person.

By charter of the 9 W. 3, the borough of Eye was incorporated, under the name of the bailiffs, burgesses, and commonalty of Eye; it consisted of twelve capital burgesses, out of whom the bailiffs were chosen, and twenty-four common councilmen, and an indefinite number of freemen. The charter did not point out who were entitled to be admitted freemen, but in the 8th Eliz. the

corporation made a by-law, that as often as any vacancy should happen by death or otherwise in the number of the twelve capital burgesses, the remainder should elect others out of the common council of twenty-four to fill such vacancies ; and that upon the happening of any such vacancies in the number of [272] twenty-four common "councilmen, such vacancies were to be filled by freemen inhabiting the town, and who had been resident and dwelling therein for the space of one year at least, to be elected by a majority of the twenty-four ; and that once in every quarter of a year, the bailiffs should hold a great court, and that at every such court it should be lawful for the bailiffs to admit to the freedom of the town such persons as should be suitors for the same, and withal should be thought honest and well-disposed men, and being such as had been resident and dwelling within the town of Eye by the space of one whole year at least. The affidavit then stated that George Twitchett had been resident and dwelling for the space of one whole year on the 27th October last, when one of the great courts was held by the bailiffs of the town, and that he had attended, requested and demanded of the bailiffs to be admitted to his freedom.

Cooper now moved for a mandamus to the defendants to compel them to admit George Twitchett to his freedom ; and he contended that the by-law was imperative upon them to admit any person qualified as therein mentioned to the freedom of the borough.

Abbott, C. J. I am perfectly satisfied, that this by-law does not give to any person resident during the time therein mentioned an absolute right to be admitted to its freedom. The words are, "that it shall be lawful for the bailiffs, &c., to admit." Those words clearly give to the bailiffs a discretionary power to admit the persons who have the qualifications therein mentioned, but they by no means make it imperative on them so to do. I think, therefore, that this rule should be refused.

Rule refused.

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The KING v. FOWLER and SEXTON.

The record, in a case of felony at the Quarter Sessions, after stating the indictment, plea of not guilty, and verdict of guilty thereon, added, that, because it appeared to the justices, that after the jury had retired, one of them had separated from his fellows, and conversed respecting his verdict with a stranger ; it was considered that the verdict was bad, and it was therefore quashed, and a *venire de novo* awarded to the next session. It then proceeded to set the appearance of the parties at the next sessions and the trial and conviction by the second jury : whereupon all and singular the premises being seen and considered, judgment was given, &c. Held, upon a writ of error brought, that the judgment was right.

THIS was a writ of error, brought to reverse a judgment obtained against the defendants at the Quarter Sessions for the county of Sussex. It appeared by the record, that the defendants were indicted for stealing oats, to which indictment they pleaded not guilty, and put themselves upon the country. Upon this indictment they were found guilty. The record then stated, that because it appeared to the said justices, that, after the evidence given on the trial of the said issue had been heard, and after the said jurors had departed from the court, in order to consider of the verdict to be by them given thereon, and before the delivery of the said verdict in court, one C. O., a juror, did, without the permission of the said justices, withdraw and separate himself from the rest of the jurors, and being so separated, did hold conversation with one J. C., the said J. C. not being one of the said jurors, of and concerning the said trial, and concerning the verdict then about to be given thereon ; therefore it was considered, that the verdict given in this behalf was bad and erroneous, and the same was quashed by the judgment of the said justices : and it then proceeded as follows ; "therefore, let a new jury come before the justices, at the next general Quarter

Sessions of the Peace to be holden at Chichester, in and for the said county, to try whether the defendants, or either of them, are guilty of the premises in the indictment charged upon them or not; because, as well W. B. L., who prosecutes for our lord the king, as the said defendants, have put themselves upon that jury: the same day, &c., at which last-mentioned *general Quarter Sessions holden at Chichester aforesaid, on &c., before &c., justices of [274] our lord the king, assigned to keep the peace in the said county, also to hear and determine divers felonies, &c., committed in the county aforesaid, come as well the said W. B. L., who prosecutes for our lord the king, as the defendants, in their proper persons. The record then stated the conviction of the defendants by the second jury, whereupon all and singular the premises being seen and considered, judgment was given, &c. The errors assigned were, first, that the justices, at the Quarter Sessions held at Chichester, had no jurisdiction to try the offence charged in the indictment; secondly, that the justices first mentioned in the record, had no power or jurisdiction to quash the first verdict, and order a new jury to come; thirdly, that it did not appear before what justices the new jury should come, or that they were justices of the county of Sussex; fourthly, that the new jury were ordered to come, after the benefit of clergy was allowed; fifthly, that there was no bill of indictment preferred after the first verdict; sixthly, that there was no arraignment after the first verdict.

Norton, in support of the writ of error. The first jury having pronounced a verdict upon the issue joined, the justices had no power to order a second trial; for that would be, in effect, to grant a new trial in a criminal case, which cannot be done; and if the justices had this power in the case of a conviction, they would equally have it in the case of an acquittal. Secondly, it does not appear that the new jury were to come before justices of the county of Sussex. [BAYLEY, J. By the venire, the second jury is to come before the justices, *at the next general quarter sessions of the peace to be holden at Chichester, in and for the said county.] Though it is stated that the [275] jury should come before the justices at, &c., to be holden at, &c., yet other justices than those assigned for the county of Sussex might be present at those sessions; and the terms of the record, in a criminal case, ought to be construed strictly. It is also stated upon the record, that the prisoners had put themselves upon the second jury. Now it does not appear that there was any arraignment before the second jury; and, if the record of the first trial is to be considered as a nullity, then the *whole* of it is to be deemed void, and a new arraignment and new plea should be taken. [ABBOTT, C. J. It is expressly stated, that they had pleaded not guilty, and put themselves on the country; and having pleaded once, it was not necessary for them to plead *de novo*.] The judgment appears to be given "on all and singular" the premises; but, as one trial of the two must necessarily be irregular, the judgment pronounced upon the whole record must be erroneous, for it is impossible to distinguish on which verdict the judgment was finally pronounced.

Per Curiam. This judgment must be affirmed. The court is bound to pronounce what appears to them upon the whole record to be the proper judgment. Here, the first verdict was either good or bad. If it were good, then the second trial was *coram non judice*, and may be considered as a nullity. If, on the other hand, the first verdict were bad, inasmuch as the prisoners had put themselves upon the country, the prisoners might well be tried at the next sessions, and *the second trial is not to be considered in the nature of a new trial, but [276] the first trial is to be considered a mistrial, and therefore a nullity. In either case the judgment is right.

Judgment affirmed.

The KING v. The Justices of ESSEX.

By 50 G. 3, c. 48, s. 25, it is provided, that any party aggrieved by the conviction under that act, who shall enter into a recognisance to appear at the next sessions, shall be at liberty to appeal to such sessions: *Held*, that this dispenses with the necessity of any notice of appeal; and that if the party duly enter into the recognisance, the sessions are bound to hear the appeal.

JESSOPP, on a former day, had obtained a rule calling upon the defendants to show cause why a writ of mandamus should not be directed to them, commanding them to enter continuances, and hear the appeal of John Wright against the conviction of a magistrate under the 50 Geo. 3, c. 48, s. 4, by which John Wright was convicted in a penalty for carrying more luggage than is allowed by the act. The said John Wright had, within fourteen days, entered into a recognisance, as required by the act, to prosecute his appeal against the conviction, and had given notice of appeal to the magistrate; but not to the informer. By the practice of the sessions for the county of Essex, eight days' notice of appeal is required to be given, in all cases, by the appellant to the respondent. It was objected at the sessions, that the practice not having been complied with in this particular, the appellant was not entitled to be heard; and the sessions allowed the objection, and dismissed the appeal. On moving for the rule nisi, the case of *Rex v. The Justices of Kent*, 5 M. & S., was relied on; and it was contended that the entering into the recognisance before the magistrate, dispensed with the necessity of giving notice of appeal.

*Walford now showed cause, and contended that the case of *Rex v. 277] The Justices of Kent* could not be taken as laying down a general rule, that in all cases where an act of parliament directed a recognisance to be entered into by a party convicted, as a condition precedent to the right of appealing, the giving notice was dispensed with; but merely as proceeding upon the terms in which the practice of the sessions was described in that case, and upon the statute under which the appellant in that instance had been convicted. The act of parliament there referred to, gave the party convicted twenty-four hours to enter into a recognisance, at the end of which time it was considered to be the duty of the informer to apply for the penalty; upon which application he would, if a recognisance had been entered into, be told of that fact, and therefore any other notice was unnecessary. In the present instance, however, the party convicted had fourteen days to enter into a recognisance, and therefore the informer could not demand a warrant to enforce the penalty until the fifteenth. A recognisance might be entered into, and an appeal against the conviction be allowed in that interval, behind the back of the informer, who could not, under such circumstances, be prepared to support the conviction. If the practice of the sessions requiring notice of appeal was to be dispensed with, so might the necessity of entering the appeal; and so the informer would have no means of knowing whether it was intended to prosecute the appeal with effect or not, but must be put to watch the proceedings of the court through the whole sessions.

*Jessopp, contrd, was stopped by the court.

*278] BAYLEY, J. I am of opinion that the sessions ought to have heard this appeal. Wherever the legislature has deemed a notice of appeal to be necessary, they have in express terms prescribed such notice; but here, by the 50 Geo. 3, c. 48, s. 25, it is expressly provided, "that any party aggrieved by the conviction, who shall, within fourteen days, enter into a recognisance to appear at the next sessions, shall be at liberty to appeal to the next general quarter sessions of the peace to be holden for the county." The act of parliament, therefore, does not require any notice of appeal; and inasmuch as the party convicted had entered into a recognisance to prosecute his appeal at the next sessions, the informer must have known that it was the intention of the party

convicted to appeal, and any further notice was therefore unnecessary. I think, therefore, that this rule ought to be made absolute.

BEST, J., concurred.

Rule absolute. (a)

(a) Abbott, C. J., and Holroyd, J., had left the court.

*CAVENAGH v. COLLETT.

[*279]

Where the return to a writ of latitat stated that the defendant was insane, and could not be removed without great danger, *and continued so till the return of the writ*, the court refused an attachment against the sheriff.

BAYLY showed cause against a rule obtained by Moore for quashing the return made by the sheriff of Wiltshire to a writ of latitat. The return stated, that the officer to whom the warrant was granted proceeded to an asylum for lunatics, where the defendant was, in order to arrest him, and found him insane, and in a desperate and raving state, so that he could not be taken or removed without danger to the life of the officer; and further, that he was in such a precarious state of health, that he could not be taken or removed without endangering his own life; but omitted to state that he continued so till the return of the writ, which the court noticed on reading the return, and said that it was certainly bad on this account, for which reason the rule was made absolute. Upon this, Bayly suggested that the return might be amended; but that, in the mean time, a rule for an attachment might be moved for, which would be absolute in the first instance, and he should have no opportunity of showing cause against it, which would be a case of great hardship upon the sheriff, who considered himself to have a good answer.

The court then said, that they would permit him to produce, on a future day, an amended return, verified by affidavit, when they would determine whether it was sufficient; and that he should be heard at the same time against the attachment, if moved for.

*On this day, Bayly produced an amended return, stating that the defendant was, on the 18th day of June last, the day before the return [*280] of the writ, when the officer came to arrest him in the lunatic asylum, insane and in a desperate and raving state, so that he could not be taken or removed without danger to the life of the officer, and in so bad a state of health, that he could not be taken or removed without endangering his own life; and that he remained and continued there so insane, and in such a bad state of health, that he could not be taken or removed, without endangering his life, from thence, until the return of the writ. This was verified by the affidavit of the attending physician, who further stated that he continued so till about the end of December.

Moore then moved for an attachment, stating that a commission of bankrupt had been since issued against the defendant, under which he had been declared a bankrupt, and had attended the meetings of the commissioners, and answered rationally all the questions that had been proposed to him; but

The court said, that being in possession of the facts, they should not interfere by attachment, but leave him to his remedy by action, if he thought he could make any thing of it; and they permitted the amended return to be filed.

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*BARBER v. GAMSON.

Where part of the consideration-money for an annuity had been deposited in the hands of the grantee's attorney, till certain houses, out of which the annuity was granted, should be completed; but it appeared that the money deposited had all been paid over to the grantee, in a short time after the date of the deeds, and there was no fraud in the transaction, the court refused to set aside the annuity, on the ground that the power given to them by the 53 G. 3, c. 141, s. 6, was discretionary, and that this was not the case of a fraudulent retainer contemplated by the act:

Held, also, that in the memorial of an annuity, under 53 G. 3, c. 141, it is sufficient to state that the annuity was granted for the lives of A. B., &c. (naming them,) without stating their description by residence or otherwise, or adding that the annuity was granted for their joint lives or the life of the survivor, or for a term of years determinable on these lives: *Held*, also, that in the memorial of a warrant of attorney to confess judgment, as a collateral security for an annuity, it is not necessary to state for what penal sum it authorizes a confession of judgment.

MARRYAT, in last Michaelmas term, obtained a rule to show cause why the judgment in this case should not be vacated, and the grant of an annuity, dated 25th May, 1819, and the deeds securing the same, delivered up to be cancelled; and why the same, together with the warrant of attorney upon which the said judgment is founded, should not be declared null and void, on several grounds. It appeared, from the affidavits, that the defendant, in March, 1819, was desirous of raising 2500*l.*, by way of annuity, to be charged on certain leasehold premises, which, at that time, were of about the value of 1200*l.* At the time of applying for the loan, he stated it to be his intention to employ part of the sum advanced in building houses upon the leasehold premises, which, when completed, would make them fully worth 2500*l.*, and before the money was advanced, he offered to the attorney for the plaintiff, that, as the premises in their then state, were not a sufficient security, part of the money to be advanced should be deposited in his hands, to be called for from time to time, according as it might appear, under the certificate of the defendant's surveyor, that improvements to that amount had been made. This was assented to, and on the 25th May, 1819, the day on which the consideration-money was paid, the defendant, in the presence of his own attorney, deposited 700*l.* for this purpose

*282] in the hands of the plaintiff's "attorney, who then signed the following memorandum: "Mr. Gamson has placed in my hands 700*l.*, which sum, or so much thereof as may be necessary, is to be applied in erecting and finishing in a workmanlike manner, 18 messuages upon ground at Queen's Head Walk, Hoxton, (which with other premises were assigned as a security for an annuity of 250*l.*) to be drawn from time to time, as wanted, under the order of Mr. G.'s surveyor, and the balance, if any, to be returned to Mr. G." The whole of the money was accordingly advanced to defendant from time to time, with the exception of one sum, which was due from the defendant to the plaintiff's attorney for the expenses of the deed. The last of these payments was made on the 2d August, 1819. It was sworn, by the plaintiff's attorney, that the 700*l.* had been placed in a drawer in his office, and that neither directly nor indirectly had any profit arisen therefrom, either to himself or the plaintiff. The objections to the annuity were, first, that this sum of 700*l.* had been retained contrary to the provisions of 53 G. 3, c. 141, s. 6; secondly, that the memorial stated, that the annuity was granted for the lives of four persons named, whereas the deed stated it to be for 99 years, determinable on lives; thirdly, that the descriptions of the *cestui que vies* were not stated, nor whether the annuity was for their joint lives, or that of the survivor; and lastly, that the memorial did not mention for what penal sum the warrant of attorney authorized a confession of judgment.

Scarlett, Tindal, and E. Alderson showed cause, and were desired by the court to confine themselves to the first objection. This was not a retainer within the act, for the true construction of the statute is confined *to cases where fraud has existed. The word "practices," found in the section,

shows this; and the pretences which are named, are all those which are of a fraudulent nature, and where the money retained is never ultimately paid to the grantor of the annuity. This is only a temporary retainer, and all fraud is negatived by the affidavits. Nor is it a retainer for the plaintiff's advantage; for it only increased the value of the security, which, correctly speaking, is only an advantage to the defendant. And they cited *Ex parte Mackenzie*, 4 Taunt, 323, and *Coare v. Giblett*, 4 East, 85, on this part of the case. Besides, at all events, it is not imperative on the court to set aside the deeds, but they have a discretion on the subject; *Cook v. Power*, 1 Taunt, 372. And in *Berry v. Bentley*, 6 T. R. 690, *Poole v. Cabanes*, 8 T. R. 328, and *Drake v. Rogers*, 2 Brod. & Bing. 19, the court there exercised a discretion, by only setting aside the annuity upon certain terms. Here, the whole transaction being fair, and the court having a discretion on the subject, the rule ought to be discharged.

Marryat, Denman, and *Mariott, contra*. This is an attempt to evade the provisions of a most salutary act of parliament, made for the protection of needy persons, who, otherwise, may be, from necessity, compelled to accede to any terms, however unreasonable. It enacts, that if the consideration-money, or any part of it, be retained, on pretence of answering the future payments of the annuity, or on any other pretence, *that it shall be lawful for the court to order the deeds to be delivered up to be cancelled, &c. [284] Now the words are very general, and include the present case. If this be not a retainer within the statute, because a part only has been for a time retained, then it would not be within it, if all the consideration-money were kept, and for any longer period. There is no difference, in principle, between the two cases suggested. Here, too, it is retained in consequence of a previous agreement; and it is for the benefit of the grantee, whose security is increased in value, and to the detriment of the grantor, who loses the intermediate advantage to be derived from the use of the money. The first objection, therefore, is clearly within the statute. As to the second, the memorial ought to have stated, according to the fact, that the annuity was for a term of years, determinable on lives; for, otherwise, it gives incorrect information to the grantor, for whose protection it is required. And a similar observation applies to the third objection. The last objection is founded on the schedule of the memorial given by the act; for there it is stated in the column headed "Nature of Instrument," "Indentures of lease and release. Bond, in penalty of 1200*l.* Warrant of attorney, to confess judgment on same bond." So that there, by reference to the bond, it is easy to ascertain the penal sum for which judgment is to be confessed. But here there was no bond; and, therefore, the warrant of attorney standing alone, the sum for which it authorized a confession of judgment ought to have been added.

BAYLEY, J. I am of opinion that in this case the rule ought to be discharged. As to the objection which *has been made, that the annuity was in fact granted for a term of years determinable on lives, and yet that the memorial only states the grant to be for the lives of four persons therein named, it is sufficient to say that in the 53 G. 3, c. 141, s. 2, the schedule there given, according to which the memorial is to be drawn up, contains a column headed thus "Person or persons for whose life or lives the annuity or rent-charge is granted." It does not, therefore, mention any thing respecting a term of years; and it is quite sufficient that the act has been literally complied with. The same answer may be given to the second objection, that no description of the *cestui que vies* by residence or otherwise is stated in the memorial, nor whether the annuity be granted for their joint lives or the life of the survivor: for no description is required by the schedule, and where such description is to be given, as in the case of the witnesses to the deed, it is specifically mentioned. The third objection is, that the memorial does not mention the penalty contained in the warrant of attorney for which judgment is to be entered up; but that is

not necessary, for that also is not mentioned in the schedule, and there is no reason why it should be done, inasmuch as the fifth section of the act gives to the party a power of obtaining copies of all such deeds or instruments, and he may, therefore, easily obtain all the requisite information. The material question, however, is, whether the sum of 700*l.* was retained so as to bring the case within the provision of the 6th section of 53 G. 3, c. 141; and if so, whether this court is bound, on that ground, to set aside the annuity. Now I am of opinion that the words of the 6th section give to this court a discretionary power in such cases as the present. The words are "that if the consideration, or any part of it, shall be returned to the grantee, or any of the notes in which it is paid be cancelled, or if it be expressed to be paid in money, but be paid in goods, or if any part be retained on pretence of answering the future payments of the annuity, or any other pretence, and if it shall appear to the court, that such practices as aforesaid or any of them have been used, it shall and may be lawful for the court to order every deed, &c., to be cancelled, &c." Now it seems to me, that these words import, upon the face of them, to refer to cases where improper practices exist, and that they give to the court a discretionary power to examine whether any unfair advantage has been taken of the grantor, and if so, either to set aside altogether the annuity, or to impose such terms as the justice of the case may require. The words are only, that "it shall and may be lawful," and it is not added that the court are required to order the deeds to be cancelled. Besides, this section is a transcript of the 17 G. 3, c. 26, s. 4, and upon that clause the case of *Cook v. Power*, 1 Taunt. 372, is an authority in point. And the cases of *Berry v. Bentley*, 6 T. R. 690; *Poole v. Cabanes*, 8 T. R. 328, and *Drake v. Rogers*, 2 Brod. & Bing. 19, are also authorities to show, that the power of the court is discretionary; for the court could have had no authority to impose terms in these cases, if it had been imperative upon them to order the deeds to be cancelled. Then, if this be a discretionary power, we ought to look at the circumstances disclosed by these affidavits, and in that case it seems to me that there is no ground for setting aside the annuity. The proposal here came from the grantor himself, and *no advantage has been derived to the grantee, except incidentally by the increased value of the premises upon the security of which the money was lent. Here, too, all the money was paid over within three months after the granting of the annuity. Upon the whole, as it seems to me, the proper course will be, to discharge the present rule, upon the terms, that no annuity-interest shall be charged upon this sum of 700*l.* except from the period when it was finally paid.

HOLROYD, J. As to the first three objections, I think it unnecessary to add any thing to what has fallen from my brother BAYLEY. On the last objection, also, I entirely concur with him, in thinking that the 6th clause of the 53 G. 3, c. 141, gives to the court a discretionary power, and that it is not compulsory upon them; and I think this would be the more necessary if, as it has been argued, the clause had applied to cases where the retainer was unaccompanied by any circumstances of a fraudulent nature. But I think the words "pretence" and "practices," used in this section, imply something of an improper description, against which this section, which is penal in its consequences, was intended to provide; and in this view of the case, I agree with what fell from Lord Chief Justice MANSFIELD in the case of *Cook v. Power*. Now, in a proceeding on a penal clause it ought clearly to appear that the practices have been such as clearly to show, on the part of the grantee or his agent, some misconduct which has been prejudicial to the grantor. There is nothing of that sort disclosed in the present affidavits. The only object of the retaining the money was to insure the laying it out as the grantor proposed, viz. in the building of the houses in question. This, then, was a direct benefit to the grantor, the value of whose premises was increased by the money so laid out;

but the grantee derived no other advantage than collaterally by the improvement of his security. I, therefore, entirely agree with my brother Bayley, that this rule should be discharged, and upon the terms suggested by him.

Rule discharged accordingly.(a)

(a) Abbott, C. J., and Best, J., had left the court before the argument had been concluded.

KENWORTHY v. PEPPIAT.

A writ returnable on a dies non is altogether void, and cannot be amended by the court.

Dehany had obtained a rule calling on the plaintiff to show cause why the alias bill of Middlesex, under which defendant had been arrested, and was then in custody, should not be set aside with costs for irregularity, and the defendant discharged out of the custody of the sheriff, on the ground that the writ was made returnable on Friday next after fifteen days of St. Hilary, which fell on the 2d of February, the Purification. Parke, in the mean time, obtained a rule calling on the defendant to show cause why the writ should not be amended; and both rules were directed to be brought on together.

Parke now showed cause against the first rule, and supported his own, and cited two MS. cases from 1 Tidd, 162, (6th ed.), *Bourchier v. Wittle*, 1 H. Bl. 291; *Davis v. Owen*. 1 B. & P. 342.

*But the court said, the writ being made returnable on a *dies non*, was [289] altogether void; and was distinguishable from the cases of amendment of the party's name, where as a *writ* it was good, though not applicable to the particular case. The amendment prayed for would be making a new writ; and they discharged the rule for the amendment, and made absolute the rule for setting aside the writ and discharging defendant from custody, upon his undertaking not to bring an action for false imprisonment.(a)

Bayley, J., had left the court.

(a) See *Rewbell v. Preston*, 5 East, 291; *Isman v. Huisk*, 2 N. Rep. 138; *Walker v. Hawkey*, 1 Marsh. 399.

The KING v. The Justices of LANCASHIRE.

The notice required by 13 G. 2, c. 18, s. 5, for removing an order of justices by certiorari, must state on the face of it the name of the party applying for the writ.

PARKE had obtained, on the last day of last Michaelmas term, a rule nisi for a writ of certiorari to remove certain orders of magistrates of the county of Lancaster, made for the repayment by the treasurer of that county, to different high constables, of several large sums of money from the county rate, for their reasonable and extraordinary expenses incurred in the execution of their duty in different cases of riot and tumult. The individual, at whose instance the writs of certiorari were applied for, made an affidavit in support of the rule; but the notices to the magistrates of the intention to apply for the writ, contained no mention of his name, and were all signed "Lace, Miller and Lace, attorneys."

*The *Solicitor-General*, with whom were *Raine* and *Starkie*, showed cause, and objected, that the notices were insufficient. By the 13 G. 2, c. 18, s. 5, it is enacted, that no certiorari shall be granted, unless it be duly proved upon oath, that the party or parties suing forth the same, have given six days notice in writing to the justices, to the end that they may show cause against the issuing the certiorari; and, by 5 G. 2, c. 19, no certiorari is to be allowed, unless the party prosecuting it, before the allowance, enter into a recognisance for prosecution of the writ without delay, and the payment of costs if he fail. Here it does not appear, by the notice, who the party suing out the

writ is ; it is signed by the attorneys, but they do not add for whom they appear, and for any thing that the court can know, the party suing out the writ may be a mere stranger, who has not a right to interfere upon this occasion ; and it is most important, that the justices should know this, because he is to be the party who is to enter into the recognisance, and to be ultimately responsible to them for costs.

Parke, contra. The object of the 13 G. 2, c. 18, s. 5, was merely to require the six days' notice, in order to enable the justices to appear, that they might show cause : and here that object has been obtained, for the parties have appeared ; as to the recognisance, it is only requisite that it should be entered into before the allowance of the certiorari, which may still be done. It is quite clear that the magistrates who made the order, must know who is the party suing out the writ, because he has made an affidavit in support of the rule.

*291] *Per Curiam*. The notice should be given by the party suing out the writ, and that circumstance should appear upon the face of the notice itself, for the object of it, stated by the statute, is to enable the justices to show cause against the granting the certiorari, and they may show, for cause, that the party suing out the writ was a stranger to the county, and not interested in the order. The justices, therefore, ought to have their attention called to the name of the party by the notice itself. The rule, therefore, must be discharged.

Rule discharged.

The KING v. The Justices of the Borough of CARMARTHEN and County of the same Borough.

Where by charter the magistrates of a borough, which was a county of itself, held only general sessions, twice a year, and not quarter sessions : Held, that an appeal against an order of removal might be made to the next general sessions of the peace for such borough.

Two justices of the borough of Carmarthen, on the 23d May, 1820, by their order, removed a pauper from the parish of St. Peter, in that borough, to the parish of New Church, in the county of Carmarthen. Against this order, the parish of New Church appealed, and in their notice of appeal stated their intention of appealing to the next quarter sessions of the borough of Carmarthen. At the next sessions (which, it appeared, were the general and not the quarter sessions) for the borough, held on the 21st September last, the parties accordingly attended, and applied for leave to lodge the appeal ; but the magistrates refused the application.

*292] *W. L. Taunton*, in last Michaelmas term, obtained a rule nisi for a mandamus to the magistrates to hear the *appeal. It appeared, from the affidavits, that the borough of Carmarthen was a county of itself, and that, by the charter, there were annually elected therein, six persons, called the Six Peers of the borough, who, with the mayor and recorder, were magistrates of the borough, and had the power, twice in a year, to hold a court of view of frankpledge, and to summon the sessions of the peace within the borough, and to hold the sessions of the peace there, and to do and execute all things relating to the sessions of the peace, according to the custom of England ; and that in the said court of view of frankpledge and sessions they had full power and authority to hear, execute, and determine upon all articles, misprisions, trespasses, and offences within the borough, which, according to law, belong to the court of view of frankpledge, or to the office of justices of the peace in their quarter sessions, or otherwise, to execute and determine. It also appeared, that the parish of St. Peter was co-extensive with the borough ; but that three out of eight magistrates did not reside in the parish.

Scarlett appeared for the magistrates, and stated that they were willing to proceed, in case the court thought they had a jurisdiction over appeals against orders of removal.

Peake, Serjt., and Russell showed cause on behalf of the removing parish. There is nothing in the charter of the borough enabling the magistrates to do acts relating to the poor laws at their general sessions. Lord HALE lays it down, that a general sessions is perfectly distinct from a quarter sessions. By the 13 and 14 Car. 2, *c. 12, s. 2, the appeal was given to the quarter sessions against orders of removal. But by 8 and 9 W. 3, c. 30, s. [**293] 6, the phrase was altered to "general or quarter sessions." These two acts are, however, in pari materia, and should receive a similar construction. *Rex v. The Justices of London*, 15 East, 652. Here, too, there are only three justices who can sit to determine this appeal. For, by 16 G. 2, c. 18, all the rest are disqualified. And by 17 G. 2, c. 38, it was provided, that in limited jurisdictions, where there are not four magistrates, the appeal must be to the county sessions.

W. E. Taunton, contra, was stopped by the court.

ABBOTT, C. J. I am of opinion that the true construction of the 8 and 9 W. 3, c. 30, is, that if there be an appeal to the sessions of a town which is a county of itself, where, by charter only, general sessions are held, it must be made to the general sessions. Here the magistrates are empowered to hear and determine upon all articles within the borough, which, according to law, belong to the office of justices of the peace in their quarter sessions, or otherwise, to determine. Now this is a very large expression, and comprehends, as it seems to me, a power to decide upon orders of removal. As to the other objection, it appears that there are three magistrates, at least, qualified to act, and a sessions of the peace may, it is known, be held, before two magistrates. The act of parliament, to which a reference has been made, applies only to corporations or franchises, where there are not more than four justices "altogether; and, besides, it does not apply to appeals against orders of removal. [**294] Upon the whole, therefore, I am of opinion, that this rule ought to be made absolute.

Rule absolute.

Souden's Case.

Where a return to a habeas corpus stated that a vessel, with smuggled goods on board, was found at the fish-market, within the limits of the ancient town of Rye: Held, that it did not come within the 24 G. 3, sess. 2, c. 47, s. 1, by which, if a vessel be found at anchor, or hovering within the limits of any of the ports of this kingdom, or within four leagues of the coast thereof, with smuggled goods on board, she becomes liable to forfeiture.

In this case, the return to the habeas corpus stated that the prisoner, on the 11th September, 1829, was duly convicted for that he being a subject of his majesty was found on board a certain ship or vessel, to wit, a passage vessel called The Rose in June, the said vessel being liable to forfeiture under the provisions of two acts of parliament, viz. 24 G. 3, sess. 2, c. 47, s. 1, and 42 G. 3, c. 82, s. 1, for having, after the passing of those acts and of the 45 G. 3, c. 121, been found at the fish market within the limits of the ancient town of Rye, in the county of Sussex, having on board divers large quantities of East India silk handkerchiefs, &c. It then stated that the prisoner was adjudged, in consequence thereof, to forfeit the sum of 100/, and that for default of payment he was committed to the common jail.

Lawes, Serjt., objected to this return, that the offence was not sufficiently stated. This depends on the 24 G. 3, sess. 2, c. 47, by which it is enacted, that if any ship or vessel shall be found at anchor or hovering within the limits of any of the ports of this kingdom, or within four leagues of the coast thereof, having on board any goods liable to forfeiture, such ship shall be liable to forfeiture. Here it is only stated, that the ship was found in the fish market within the limits of the ancient town of Rye. Unless the ship [**295] be liable to forfeiture, the defendant has not incurred any penalty.

The Court, (after hearing *Shepherd*, in support of the return, who cited *Rex v. Hankins*, Fort. 272, and *Rex v. Elwell*, Bart., 2 Str. 794,) were of opinion, that the objection was well founded, the corpus delicti not being sufficiently stated, inasmuch as it was quite consistent with the return that the vessel might be in the fish market in the ancient town of Rye, but drawn up on the land, which would clearly not be a case within the statute.

Per Curiam

The prisoner must be discharged.

NASH'S Case.

Where the return to a habeas corpus stated that an English seaman being found on board a ship liable to forfeiture under 45 G. 3, c. 121, s. 1, was carried before a magistrate, and upon due proof, as by the statute in that case made and provided is required, was committed, &c.: *Held*: that this was insufficient; and that it was necessary to state distinctly what proof was given, in order that the court might see whether it was the due proof required by the 7th section of the act.

THIS case was similar to Deybel's case, see p. 243; the return, after stating correctly, that the prisoner was found on board a smuggling vessel liable to forfeiture, and that he was a seaman, &c., proceeded to state that he, being such subject and seafaring man as aforesaid, and not being only a passenger on board the vessel at the time she became liable to forfeiture, was afterwards, to wit, on, &c., carried before George Dell, Esq., mayor of Dover, a justice, &c., residing [296] near Dover, the port into which the vessel had been carried, and upon due proof as by the statute in that case made and provided is required, was committed to answer such information and abide such judgment as might be given. It then proceeded as in Deybel's case to set forth an impressment and detainer.

Lawes, Serjt., now objected that this return was insufficient. It may be admitted, that in the present case it is sufficiently stated that the vessel was liable to forfeiture within the 45 G. 3, c. 121, s. 1; but here the parties have pursued the power given by the 57 G. 3, c. 87, s. 6, by which act, in case any person found on board a vessel liable to forfeiture under 45 G. 3, c. 121, be fit and able to serve his majesty in his naval service, he shall, upon such proof as by the said act of the 45th year aforesaid, or any other act, is required, be committed by such justice to prison, to answer such information and abide such judgment as may thereon be given against him in that behalf, whereupon he shall be liable to be impressed. Now this section refers to the proof required by the 45 G. 3, c. 121, s. 7, where it is stated that it shall be lawful for the justice, upon proof on oath by one or more credible witness or witnesses that such person was found on board of a vessel under such circumstances, unless he should prove to the satisfaction of the justice that he was only a passenger, to bind over such person to answer to any indictment or information; so that it appears that a particular species of proof was required by the statute. In this case, it is only stated that the prisoner was committed upon due proof as required by the statute; but whether such proof be or be not within the statute is a question of law. The return ought, therefore, [297] to have stated what proof was given before the magistrate, in order that it may be ascertained whether his judgment was correct. The court then called on the other side.

Jervis, contra, contended, that the commitment was sufficient, being only a warrant of commitment to answer certain charges, and not a conviction, in which case, he admitted that it would not have been sufficient; and he added, that in drawing the return, it had been judged proper to follow strictly the words of the commitment by the magistrate, that the party might not be deprived of the objection upon which the writ of habeas corpus had been originally obtained.

Abbott, C. J. This act of parliament of the 57 G. 3. c. 87. is one highly

beneficial in preventing frauds upon the revenue; but at the same time, inasmuch as it trenches very strongly on the liberty of the subject, we must take care that its provisions are strictly pursued. This averment is one of a conclusion of law; it states that upon due proof the party was committed. Now whether that was so, this return does not enable us to judge; for unless we know what the proof was which was given, it is impossible for us to tell whether it was the proof required by the act of parliament. The circumstances stated in the introductory part of this return, seem to me to be quite sufficient to warrant this commitment; and if it had been stated, that upon due proof of the matters before mentioned, the prisoner was committed, I should have thought it sufficient. In the present case, however, the prisoner must be discharged.

*BAYLEY, J., concurred.

HOLROYD, J. The power of the magistrate to commit depends on the proof before him; and the rule is, that where a limited authority is given, it must be shown to have been strictly pursued. Here it is only stated, that on due proof the justice committed: but he may suppose that to be due proof which is not the proof required by the statute. He ought, therefore, to state what it was, and then the court will be enabled to form a judgment whether he has judged right.

BEST, J., concurred.

The prisoner was discharged.

The KING v. THE JUSTICES OF MIDDLESEX.

The Court of K. B. have no jurisdiction to grant a mandamus to magistrates to make an order of maintenance on a particular parish.

BOLLAND, in last Michaelmas term, obtained a rule nisi for a writ of mandamus, to R. B. and J. M., Esquires, two of the justices of the peace for the county of Middlesex, commanding them to make an order on the churchwardens and overseers of the poor of the parish of Christ Church, for the relief of a bastard child, residing in the parish of St. Stephen's, Coleman Street, in the city of London. It appeared, by the affidavits, that Alice Ramsey, a single woman, being resident in the parish of Christ Church, became pregnant with a bastard child, and that, on the 4th August, 1820, she was, by an order under the hands and seals of two justices, directed to be removed to the parish of Butherford, *in the county of Suffolk, as the place of her last legal settlement. On the same day, however, in consequence of her advanced state of pregnancy, the execution of the order was suspended, and she was delivered of the bastard child in question, in the parish of Christ Church, on the 5th August. The order was never served on the parish of Butherford, nor was the pauper ever removed thither; but on the 14th September, she was, at the instance of the parish officers of Christ Church, who bought the ring and paid the marriage fees, married to Thomas Ramsey, the putative father of the child. No order of bastardy was ever obtained against Thomas Ramsey, who was a settled inhabitant of the parish of St. Stephen's, Coleman Street, and with his wife and the child, chargeable to that parish.

Andrews showed cause, and contended, that the child being born under a suspended order, by the 35 G. 3, c. 101, s. 6, was settled in the place of the legal settlement of Ann Ramsey at that time. Now it appears that that place was Butherford; at any rate, there is no ground for saying that she was settled at Christ Church; the magistrates, therefore, have no authority to make this order, and there is no instance where this court have interfered upon such subjects.

Bolland, contra. The child is legally settled in Christ Church; for although it was born under a suspended order, yet, as that order was never executed, it

is the same as if it had never existed ; and then there is nothing to take the case out of the ordinary rule, that a bastard is settled where it is born. And as to the jurisdiction of the magistrates to make an order of maintenance, in the *300] *case where a child within the age of nurture is resident in a place different from its place of settlement, he cited *Rex v. Hemlington*, Cald. 6; *Simpson v. Johnson*, Doug. 7; *Rex v. Saxmundham*, Fort. 307; *Rex v. St. Giles in the Fields*, Burr. S. C. 2. Here, the only mode of enforcing this right, is by application to the court for a mandamus. *Cur. adv. vult.*

ABBOTT, C. J., now delivered the opinion of the court. We have considered this question, and we are all of opinion, that this court ought not to grant a mandamus in the present case. It is the ordinary practice of the court to grant this writ, to compel magistrates to hear and determine a case in which they have a jurisdiction to hear, but have refused altogether to exercise it : but there is not an instance which can be cited, where the court have granted a mandamus to justices to compel them to come to any particular decision, which would be the case if we were, upon the present occasion, to order them to make an order of maintenance upon the parish of Christ Church. We had at one time thought that it might be desirable to give our opinion as to the merits of this case, for the guidance of the magistrates ; but, upon reconsidering the matter, we think that we ought not to give an extra-judicial opinion upon the case. Upon the ground, therefore, that we think the court have no power to grant a mandamus to the magistrates, to compel them to make such an order of maintenance, we are all of opinion that this rule ought to be discharged.

Rule discharged.

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*MAY v. GWYNNE.

The court will not compel the vestry-clerk of a parish to produce and permit copies to be taken of documents from the parish chest in his custody, for any other than parochial purposes.

A RULE had been obtained, calling on the plaintiff in this case, to produce and permit the defendant to inspect and take copies of certain papers, belonging to the parish of Hammersmith, which were in his possession. It appeared that the defendant had, by the authority of the vestry, made a report in writing respecting the conduct of the plaintiff, founded, as it was stated, on the inspection of certain documents then in the parish chest, but now in the possession of the plaintiff. This report having been published, an action was brought by the plaintiff for a libel, which the defendant wished to justify, and these documents were necessary for that purpose ; and the defendant contended, that he, being an inhabitant of the parish, was entitled to see and take copies of them. It was doubtful, in the affidavits, whether the plaintiff or another person, was legally the vestry-clerk of the parish.

Scarlett and *Gurney* showed cause, and contended, that the plaintiff was not bound to produce the papers for any other than the ordinary parish purposes, they being in his custody as vestry-clerk ; but they added, that he was willing to undertake to produce the documents at the trial.

The *Solicitor-General*, in support of the rule, contended that, upon the affidavits, it was doubtful whether the plaintiff was legally the vestry-clerk ; and *302] that, "as an inspection of these documents was absolutely necessary to the defendant's case, they having been the foundation of the report, for the publication of which the action was brought, the court would compel the plaintiff to permit the defendant to see and take copies of them. As to the offer to produce them for the first time at the trial, it could be of no benefit to the defendant."

ABBOTT, C. J. This is a motion of the first impression ; and I am of opinion that the court ought not to order a plaintiff to furnish evidence against himself If the plaintiff be legally the vestry-clerk, then he has a right to the custody of

these documents ; and if he be not, then the person really entitled to the office may by mandamus obtain possession of them. But the defendant has no such right ; and I think that we ought not in this case, which is for a libel, to grant the defendant's application. If the papers had been wanted for the purpose of advancing any parochial right, the case would have been different.

Rule discharged with costs.

*DOE, on the Demise of DORMER v. WILSON.

[*303]

A copyhold was surrendered to the use of husband and wife, for their natural lives and the life of the longer liver of them, and from and after the decease of the survivor of them, to the right heirs of the survivor for ever : *Held*, that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor.

THIS was an action to recover possession of copyhold messuages, lands, and buildings, held of the manor of Croxley, otherwise Croxley Hall, in the county of Herts. The declaration in ejectment was served on the 31st May, 1817, and the demise was laid on the 2d of April preceding. At the trial, before GRAHAM, B., at the Lent assizes, 1818, a verdict was found for the plaintiff subject to the opinion of the court on the following case.

Samuel Fludyer, being seised to him and his heirs, at the will of the lord, according to the custom of the manor, of the premises in reversion, expectant on the determination of an estate for life therein in Sarah Willett, contracted with the Honourable John Mordaunt to sell and convey to him the said estate and interest; and in consideration of 900*l.* by him paid to Samuel Fludyer, he, on the 24th March, 1762, surrendered the said premises, and the reversion and reversions, and all the estate, right, title, and interest of the said Samuel Fludyer, of and in and to the same, into the hands of the lord of the said manor, out of court, according to the custom of the manor, to the use and behoof of the Honourable John Mordaunt, Esq., and Elizabeth his wife, for and during the term and terms of *their natural lives, and the life of the longer liver of them, and from and after the decease of the survivor of them, to the right heirs of the survivor of them, for ever*, subject, *nevertheless, to the estate for life [*304] of Sarah Willett. And at the next court-baron, holden on the 15th April, 1762, John Mordaunt and Elizabeth his wife were admitted to the premises, pursuant to the said surrender, to hold to the said John Mordaunt and Elizabeth his wife, for their natural lives, and the life of the longer liver of them; and from and after the decease of the survivor of them, to the right heirs of such survivor for ever (subject, nevertheless, to the life estate of Sarah Willett) of the lord of the said manor, at the will of the said lord, according to the custom of the said manor. On the 31st March, 1767, the said John Mordaunt and Elizabeth his wife (the latter being first solely examined by the steward) surrendered the premises, out of court, into the hands of the lord, by the hand and acceptance of the steward, according to the custom of the said manor, to the use and behoof of Henry Pratt, Esquire, and Elizabeth his wife, for their lives, and the life of the longer liver of them, and after the decease of the survivor, to the right heirs of the said Henry Pratt, for ever, subject, nevertheless, to the aforesaid estate for life of the said Sarah Willett; and at a court-baron, holden on the 7th April, 1767, Henry Pratt and Elizabeth, his wife, were admitted to the said premises, pursuant to the said last-mentioned surrender, and to the above uses thereof. On the 5th of July, 1767, John Mordaunt died, leaving the said Elizabeth Mordaunt, his widow, him surviving, who, on the 23d January, 1768, married the Honourable Charles, afterwards Lord Dormer, and died on the 22d September, 1797, leaving the lessor of the plaintiff, her only son and heir at law. Lord Dormer died on the 29th March, 1804. On the 27th May, 1775, Henry Pratt and Elizabeth his wife (the

*305] *latter being first duly examined) surrendered the said premises, out of court, to the use and behoof of William Wilson, his heirs and assigns for ever, subject to the aforesaid estate for life of the said Sarah Willett; and at the next subsequent court, holden on the 6th June, 1775, the said William Wilson was accordingly admitted to the premises, to hold to him and his heirs for ever, subject to such life-estate of Sarah Willett. Sarah Willett died upon the 13th April, 1777, whereupon the said William Wilson immediately took possession of the premises, and enjoyed the same from that time until his death. On the 29th December, 1807, William Wilson died, leaving the present defendant, his only son and heir at law, him surviving, who was, on the 9th December, 1808, admitted tenant to the premises to hold to him and his heirs; and he entered and still is in possession of the same. The case was argued on a former day in this term, by

Sugden, for the plaintiff. The question in this case is, whether the ejectment be barred by the statute of limitations. If Mr. and Mrs. Mordaunt, by the surrender of 1767, conveyed to Pratt an estate only for their joint lives, and not for the life of the survivor; Mrs. Mordaunt, having survived her husband, might have entered on the premises upon the death of Mrs. Willett in 1777. If, on the other hand, they conveyed to Pratt the estate *for the life of the survivor*, no right of entry accrued until the death of Mrs. Mordaunt in 1797, and then the ejectment is in time. The quantity of estate conveyed to Pratt, must depend upon the limitation to Mr. and Mrs. Mordaunt under the surrender of March, 1762. Now that was an estate for their joint lives, and for the life of the survivor, with a contingent remainder in fee *to the survivor. In

*306] Co. Litt. 191 a, it is laid down that if lands be letten to two for term of their lives et eorum alterius diutius viventi, and one of them granteth his part to a stranger, whereby the jointure is severed, and dieth, here shall be no survivor, but the lessor shall enter into the moiety, and the survivor shall have no advantage of these words, et eorum alterius diutius viventi, for two causes. First, for that the jointure is severed. Secondly, for that those words are no more than the common law would have implied without them, and expressio eorum quae tacite insunt nihil operatur. [BAYLEY, J. When Mr. M. died, what estate vested in Mrs. Mordaunt?] Mr. and Mrs. M. were tenants by entireties; that estate could not be severed, and therefore it would continue in Mrs. Mordaunt after her husband's death, and she, as survivor, would take in consequence of the first limitation. In Litt. s. 283, it is laid down, that "if lands be given to two men and the heirs of their two bodies begotten, the donees have a joint estate for the term of their two lives, and yet they have several inheritances; for if one of the donees have issue and die, the other which surviveth shall have the whole by the survivor for term of his life, and if he which surviveth hath also issue and die, then the issue of the one shall have the one moiety, and the issue of the other shall have the other moiety of the land, and they shall hold land between them in common, and they are not joint-tenants, but tenants in common," and in s. 285, it is laid down, that "if lands be given to two and the heires of one of them, this is a good joyniture, and the one hath a freehold and the other a fee simple; and if he which had the fee dieth, he

*307] which hath the freehold shall have the entiertie by survivor *for terme of his life." These authorities clearly establish that Mr. M. and Mrs. M., by the surrender of March, 1762, took a joint estate for their lives, with a contingent remainder in fee to the survivor. By their surrender of March, 1767, the estate which was vested in them for their lives and for the life of the survivor, passed, but the contingent remainder in fee was not affected by it; for such a remainder cannot be transferred by surrender, because no person is tenant of the remainder, and it is settled that a surrender cannot operate by estoppel, *Goodtitle v. Morse*, 8 T. R. 365; *Doe v. Tompkins*, 11 East, 185. Upon the death of Mr. Mordaunt, the remainder became vested in his widow, who sur-

vived. During her life, however, Pratt and his wife, the surrenderees, were entitled to the possession, and consequently no right of entry accrued till the death of Mrs. Mordaunt, which did not happen till 1797, within twenty years of the bringing of this action, and the statute of limitations is therefore no bar.

The *Solicitor-General*, contra. By the surrender of 1762, Mr. and Mrs. Mordaunt took an estate by entirities, during their joint lives, with a contingent remainder in fee to the survivor, taking effect immediately upon the decease of the person who should first die. Upon the death of Mr. M. in 1767, the fee vested absolutely in Mrs. M. and from that time the statute of limitations began to run. In *Green*, on the demise of *Crewe v. King*, 2 Bl. 1211, the surrender was to husband and wife and the longer liver of them, and after the death of the longer liver of them, to the right heirs of the husband *and wife for ever. The court held this to vest an immediate fee-simple in the [308] husband and wife by entirities; but *BLACKSTONE*, J., is reported to have said, "Supposing it to be a grant to husband and wife for their lives, with a contingent remainder to the survivor in fee, the effect would be just the same; for both being seised of the entirety for their joint lives, the husband could not, by any alienation, destroy the particular estate, so as to bar the contingent remainder: and then, upon his death, she (as survivor) became absolutely seised, in her own right, of the remainder in fee simple." Here the fee is clearly contingent, and the prior limitation nearly verbatim with the first in *Green v. King*. The opinion of *BLACKSTONE*, J., therefore, is an authority to show, that upon the death of Mr. M., the fee immediately vested in Mrs. M. In *Vick v. Edwards*, 3 Peere W. 372, lands were devised to B. and C., and the survivor, and the heirs of such survivor, in trust to sell. Lord Chancellor TALBOT held, that the fee was in abeyance, but that the trustees, by joining in a fine, might make a title to a purchaser by estoppel; and *Clarke v. Sydenham*, Yelv. 85, is an authority to show, that, when once the survivor is known, the fee is vested in him. It is said, however, that although Mrs. M. took a contingent remainder in fee simple, yet that she and Mr. M. were entitled to a vested estate during their joint lives, and during the life of the survivor; and consequently, that that estate, during the life of the survivor, not resting in contingency, was transferable at law, like any other vested estate, and was, in fact, transferred, by the surrender of 1767, to Pratt. That, however, must depend upon the nature of the *estate taken by a surviving joint-tenant for life. Now where an estate is granted to A. and B., during [309] their lives, or, which is the same, during their lives, and the life of the survivor of them, they take an estate during their joint-lives, with a mere possibility of remainder by survivorship, which is not grantable at common law. For if the estate of the survivor was vested, it must follow that each joint-tenant would, upon severance of the joint-tenancy, be entitled to a moiety during his own life, and for the life of his co-joint-tenant. In *Eustace v. Scowen*, Sir W. Jones, 55, the law is thus laid down, "Et per les 4 justices fuit resolve et issint adjuge que un joint-tenant n'ad aucun estate mes pur son vie demesne men sollement possibilite de survivor pur la part de son companion, et quant il grant ouster son estate ou fist partition sur son mort son part resortera al reversion et le possibilite de survivor ale et le grantee n'ad forsque estate pur son vie;" and in the passage cited from Co. Litt. 191 a, it is stated, "that if lands be letten to two for the term of their lives, and the life of the longer liver, and one of them granteth his part to a stranger, whereby the jointure is severed and dieth, there shall be no survivor." Now, if the estate for the life of the survivor was vested during the joint lives, the act of one of the joint-tenants could not destroy the estate of the survivor. That, therefore, is an authority to show, that the estate, during the life of the survivor, is not a vested remainder, but a mere possibility of a remainder. Mr. Butler, in his note to this passage, states, that the grant of an estate to two, and the survivor of them, and the heirs of the survivor, does

*310] not make them joint-tenants *in fee, but gives them an estate of freehold, during their joint lives, with a contingent remainder in fee.(a) According to his opinion, therefore, the first estate is determined upon the death of either of the joint-tenants, which would not be the case if the estate for the life of the survivor were a vested interest. This construction of the limitation is consistent with that which prevails in similar cases. Thus a limitation to A and B. and the survivor of them, and the heirs of such survivor, creates a contingent remainder in fee, to take effect immediately upon the decease of the one first dying. Now it would be inconsistent with that rule, and be contrary to the general simplicity of the common law, to hold that under a limitation to A and B. during their lives, and the life of the survivor of them, and after the death of the survivor, to the heirs of such survivor, A. and B. should take a vested estate, grantable at the common law by them during their lives, and during the life of the survivor, with a contingent remainder in fee to the survivor, commencing from the death of such survivor; or, in other words, that the chance of survivorship should be partially grantable, and not grantable to the full extent.

Sugden, in reply. The effect of the argument on the other side is to give as small a vested estate as possible. The other is the natural construction; for the grant to Mr. and Mrs. M. "for and during the term and terms of their natural lives, and the life of the longer *liver of them," is one connected sentence without a break, and the next limitation begins, "from and after the decease of the survivor of them." In point of grammatical construction, there is no contingent limitation till the decease of the survivor. The note of Mr. Butler to Co. Litt. 191 a, has nothing to do with the present question; for the expression used by him there is merely with reference to the time when the contingent remainder vests; and there can be no doubt that it vests upon the decease of either of the joint-tenants for life. If Mrs. M. had not granted away her life-estate, it would have merged in the fee. *Vick v. Edwards* has always been considered a case of doubtful authority; but the mode in which conveyances are taken, in cases similar to *Vick v. Edwards*, shows the opinion of the profession, that the trustees can convey a vested estate for their joint lives, and the life of the survivor of them. It is impossible to contend that the right of survivorship between joint-tenants partakes of the nature of a contingent remainder. It is part of the quantity of estate contained in the original limitation; and here the additional words only express the operation of law.

ABBOTT, C. J., now delivered the judgment of the court, and after stating the facts of the case, proceeded as follows. It is, therefore, necessary to consider in this case, with respect to the statute of limitations, whether Lady Dormer could have entered on the death of Mrs. Willett, and this depends upon the effect of the surrender made to Mr. and Mrs. Mordaunt in 1762, and *of the surrender made by them in 1767. The latter was made to a purchaser for a valuable consideration, and was undoubtedly intended to pass the whole remainder expectant on the death of Mrs. Willett, and Mrs. Mordaunt was examined apart; it must, therefore, receive the utmost effect of which it was legally capable, and be construed to pass all that the surrenderors could lawfully convey. Now the quantum of estate which they might lawfully convey must be commensurate with the quantum of estate that was actually vested in them at the time of their surrender; and this by the effect of the surrender to them was an estate held in entirety for their joint lives and the life of the survivor. This quantum of estate was subject, in itself, to no contingency, although it was uncertain which of the two might be the survivor. To this estate was superadded a further estate in fee, which was contingent in respect of the person in whom it might afterwards vest. And although it be true, that if the con-

(a) See 2 Roll. Ab. 150, pl. 5; 2d Resolution in *Harbin v. Loley, Noy*, 157, 158; Bro. Ab. *Joint Tenants*, pl. 28.

(b) See *Fearne on Contingent Remainders*, 6th ed., p. 857.

tingency had been changed into a certainty by the death of Mr. or Mrs. Mordaunt while the estate, originally granted to them, remained in the original grantees, the survivor would, in that event, have become seized in fee, by the union of the two estates, for life and in fee in the same person: yet this effect was prevented by the previous surrender to Pratt, who, in our opinion, took, under that surrender, an estate for the lives of Mr. and Mrs. Mordaunt, and the survivor of them. The contingent remainder to the right heirs of the survivor of Mr. and Mrs. Mordaunt could not pass by their surrender, and was not defeated or destroyed by it. The consequence, in our opinion, is, that upon the death of Mr. Mordaunt this remainder vested in his widow as a remainder expectant upon an estate then *vested for her life in their surrenderee, who [*313 was tenant pur autre vie. This appears to us to flow from the principles laid down by Littleton, as quoted by Mr. Sugden in his argument. Suppose the estate had been surrendered to Mr. and Mrs. Mordaunt for their joint lives and the life of the survivor, with remainder to the eldest of the four sons of A. B. a stranger who should happen to be living at the death of Mr. or Mrs. Mordaunt, whichever of the two should die first. In such a case the contingency would have been determined by the death of Mr. Mordaunt, and the remainder would then have vested as a remainder in the person answering the description expectant on the death of Mrs. Mordaunt. And how does this differ from the effect of the two surrenders in the present case, considering that effect to be to constitute a contingent remainder in the survivor of Mr. or Mrs. Mordaunt, expectant upon an estate held by a stranger for the life of that survivor? And might not Mrs. Mordaunt become, upon the death of her husband, seized of a remainder expectant on an estate then held for her life by Pratt or the person claiming under him? We think that, upon the events, she might and did become seized of such an estate, descendible to her heir, and who, therefore, had twenty years allowed for his entry after her death, upon which event the right of entry first accrued. And this opinion does not impugn either of the cases cited on the other side. In *Vick v. Edwards*, the object was to pass the fee, and Lord TALBOT thought that might be done by a fine, operating by way of estoppel. A surrender of a copyhold cannot have that effect. In *Green v. King*, the husband only had surrendered; and it was held, that this surrender had no effect upon the estate of his wife. In the present *case [*314 Mrs. Mordaunt joined in the surrender. Upon the whole, therefore, we are of opinion, that there must be

Judgment for the plaintiff.

The KING v. BURDETT.

Where an information alleged that a libel was published of and concerning the government of the country, and the libel did not, in express terms, charge the acts to have been done by the government or its order, the court are to take the whole libel together, to interpret it in the way in which ordinary persons would understand it, and to judge, from the whole tenor of it, whether it be written of and concerning the government; and the court having come to this conclusion, such an information was held good after verdict, although the record did not contain any averment of extrinsic facts, in order to show that the libel was written of and concerning the government.

Where the information alleged that the defendant, intending to cause it to be believed that divers subjects of our lord the king had been inhumanly killed by certain troops of our lord the king, published a libel of and concerning the said troops; and the only innuendo in the libel was applied to the word *dragoons*, meaning the said troops of our said lord the king, and meaning thereby that divers liege subjects of our lord the king had been inhumanly cut down and killed by the said troops of our said lord the king: Held, after verdict, that this was sufficiently certain, without defining what particular troops were meant.

Where a defendant was convicted of a libel, which, on the face of it, purported to have been written in consequence of his having read a statement of facts in different newspapers, an affidavit that he did read such statements in such newspapers may be received in mitigation of punishment; but an affidavit that the facts contained in those statements were true, is not admissible.

SCARLETT moved in arrest of judgment, and contended, first, that it did not appear on the record with sufficient certainty that the libel was published of and concerning the government of this realm, there being no introductory averments stating any facts, so as to show with certainty that the libel in the record applied necessarily to the government; and, secondly, that it did not appear with sufficient certainty concerning what troops the libel was published, it being stated only that it was of and concerning certain troops.(a) He referred to *Rex v. Horne*, Cowper, 672; *Ball v. Roane*, Cro. El. 308; and *Rex v. Shipley*, 21 Howell, St. Tr. 1042.

Cur. adv. vult.

*315] **ABBOTT, C. J.** This was an information which charged that the defendant unlawfully, and intending to excite discontent, disaffection, and sedition amongst the liege subjects of the king, and particularly amongst the soldiers of the king, and to excite the liege subjects of the king to hatred and dislike of the government of the realm, and to insinuate and cause it to be believed by the liege subjects of the king, that divers of the liege subjects of the king had been inhumanly cut down, maimed, and killed by *certain* troops of our lord the king, on the day, and at the time mentioned, unlawfully and maliciously did compose, write, and publish, and cause to be composed, written, and published, a certain scandalous, malicious, and seditious libel of and concerning the government of this realm, and of and concerning the *said* troops of our lord the king, according to the tenor and effect following. The alleged libel is then set forth upon the record, and only one innuendo introduced, which follows the word *dragoons*, and is as follows: "Meaning the said troops of our said lord the king, and meaning thereby that divers liege subjects of our lord the king had been inhumanly cut down, maimed, and killed, by the said troops of our said lord the king." A motion has been made to arrest the judgment upon two objections: the first is, that it does not sufficiently appear upon this record that the libel is written of and concerning the government of the realm; and the second is, that that part which relates to the troops of our said lord the king is indefinite, and that it should rather have been charged, if at all, as a libel upon the troops generally, than as "of and concerning the said troops." It was contended that the court, in forming its judgment in this case, is to look at *316] the "record alone; and that if an offence be not there charged with sufficient certainty, we cannot aid the imperfection of the record by any extra-judicial knowledge we may have of any supposed facts and circumstances to which the writer may be imagined to refer. For the general doctrine of the law upon this subject, we were most properly referred to the judgment given by Lord Chief Justice DE GREY, in the case of *The King v. Horne*. That judgment has been universally considered to contain the best and most perfect exposition of the law upon this subject, and is equally to be admired for the learning and sound sense that is to be found in it, as for the plain and unaffected manner in which the whole is drawn up.

Our judgment upon the present occasion is founded upon the application of the principles there laid down to the case now before the court. We were also referred to the case of *The King v. Shipley*, where the judgment was arrested. Now, upon looking at the record in that case, I find that in two instances, at least, the words "the king," occurring in the pamphlet, are alleged by innuendo to mean "our said lord the king;" and, in one instance, the expression "the parliament," occurring in that pamphlet, is asserted by that information to mean "the parliament of this country." But upon reading the whole of that pamphlet, it is obvious that its general character was that of an abstract and hypothetical composition, in parts perfectly abstract, in other parts hypothetical; and there was not any averment on the record to show that those things, which were there put by way of hypothesis and supposition, were intended to apply to the existing state of the country, nor to the existing sovereign or parliament.

(a) See the information, ante, p. 115.

*and I conceive the ground of the judgment of the court in that case, of which we have not a full and perfect report, must have been that that particular publication was in its own nature so abstract and so hypothetical, that without something more than appeared upon that record, the court could not pronounce those matters to be scandalous or defamatory, of and concerning the kingdom or the king. But the record in the present case is of a very different nature. The writer of the paper in question begins by mentioning his having read, in some papers that had arrived late the day before, some matters which had filled him with indignation and horror; he therefore begins by saying, in plain terms, that he has read something which is to be the subject of what he shall hereafter say. Then the question is, upon this part of the case, whether that which follows must not be understood by the judges (as undoubtedly it will be by all other men) to be of and concerning the government of this kingdom, and calculated to excite disaffection and dislike to that government. It is true, that the writer has not distinctly asserted that that act of the dragoons or military to which he is advertizing was done by the authority, or that it even had the approbation, of the government. We are, however, to judge from the whole tenor and import of that writing, whether it does not mean to convey to the minds of his majesty's subjects that much has been done amiss by the existing government. Is it possible to understand as alluding to any other than the government of the country, that which is said very early in this paper concerning the use of a standing army in time of peace, or the reference to the wisdom of our forefathers in dismissing the Dutch guards of *King William? [318] The passage by which the gentlemen of England are strongly invited to exert themselves to uphold the rights and liberties of their country; that by which other persons are invited to join in the general voice, and to demand justice and redress, and to head public meetings for that purpose; the supposition that death by military execution may be the consequence of a meeting, but that a man can never die so well as in advocating the cause of the liberties of his country; the allusion to the abdication of King James, and the conduct of the military on the acquittal of the seven bishops; and the contrast, which immediately follows, between that which is supposed to have been the existing law of military discipline at that time and the present;—are all, as it seems to me, capable of only one application. It seems to me, therefore, to be utterly impossible that any person should read this paper without saying, upon the whole, that it is a strong appeal to the people of this country to exert themselves in maintenance of the rights and liberties of the country, which rights and liberties cannot have been invaded and put in jeopardy by the unauthorized act of particular troops, but only by some act of the existing government of the country. For these reasons, we are of opinion, that reading and understanding this as judges, in the way in which other men should read and understand it, we are bound to say that it is a paper plainly importing in itself to be of and concerning the government of the country. It appears to me that there is no other alternative; for if we do not say that it is of and concerning the government, we can only say that it is altogether without application.

*I come now to the second objection, viz. the want of certainty in the manner in which the troops are mentioned. I take it to be perfectly clear, that slanderous matter on any part of the king's troops might be the subject of a criminal prosecution, although the writer should not define what particular part of the troops were referred to. Let us look, then, to the whole of this record, and see what the defendant had in view. It is charged, that intending to insinuate and cause it to be believed that divers of the liege subjects of our lord the king had been inhumanly cut down, maimed, and killed by certain troops of our lord the king; (that is, by part of the troops of our lord the king,) he published of and concerning the said troops of our lord the king; (that is, of and concerning some troops, an undefined part of the troops of our

lord the king; certain matters, and having used the word dragoons, it is averred that he used that word to denote the said troops; that is, those troops before mentioned, whom it was his object to bring into hatred and contempt. Understanding that to be the plain and obvious meaning of this record, taken together, we are of opinion, that the objection cannot prevail. But, even supposing that it was imperfectly and indistinctly charged, yet, taking this as a libel of and concerning the government, and of and concerning certain persons not sufficiently ascertained and defined, the latter part must be rejected, and the information would then stand as a charge of a libel of and concerning the government. For these reasons, we are of opinion, that no rule ought to be granted.

Rule refused.

The defendant, in mitigation of punishment, put in an affidavit, stating that [he had read in certain *newspapers an account of the transactions represented to have taken place at Manchester on the 26th of August. They stated, that the yeomanry cavalry rode in among a large body of people assembled for the purpose of petitioning for a reform in parliament, and that several persons were killed, wounded, and maimed. The affidavit then stated, that the defendant, considering that the unprovoked aggression committed on an unarmed multitude, and the mischiefs inflicted by the cavalry, demanded the most immediate and strongest expression of abhorrence, under the impression of strongly excited feelings of indignation wrote the address, but denied that he had any seditious intention therein, or any other intention than that of rousing the attention of his countrymen to a transaction which he considered as a gross and wanton outrage upon the liberty of his majesty's subjects, and of exciting an early attention to the extreme danger of substituting military force for the civil power in the preservation of the peace. To this affidavit no objection was made. Other affidavits were then tendered on the part of the defendant, to show that the statement contained in those newspapers was founded in truth.

The *Attorney-General* contended that these affidavits could not be received. If such affidavits were received, counter affidavits on the part of the prosecution must be received also; and the consequence would be, that the court would be compelled to try upon affidavit, the question whether the persons composing the yeomanry cavalry at Manchester, on the 16th of August, had or had not been guilty of a crime. In *The King v. Finnerty*, in Hilary term, 1181, affidavits of the truth of the facts *stated in the libel were refused in mitigation of punishment. [BEST, J. In *The King v. Draper*, in Easter term, 1809, the court received such affidavits, but I believe it was with consent of the prosecutor.] Here the libel, on the face of it, appears to be founded on the statement which the defendant read in certain newspapers. He was entitled, therefore, to show, that he did read such statement in such newspapers; but his offence cannot be altered by the truth or falsehood of those statements, and therefore the truth can be no ground for the court to mitigate his punishment.

Scarlett, Denman, Phillips, Blackburne, and Evans, contrà. These affidavits are admissible. The object of the defendant is not to charge the government with the acts which took place at Manchester, but to show that his address to his constituents was called for by facts which really existed. If the facts were wholly false that might be urged strongly in aggravation of punishment, and if so, the truth of those facts may as fairly be urged in mitigation. In Starkie on Libel, p. 561, it is stated, that although the truth of the publication cannot constitute a distinguishing boundary between criminality and absolute innocence, yet it may materially affect the measure of punishment, and 3 Bacon's Abr. 495, is an authority to the same effect. They also referred to *Rez v. Horne*, Cowp. 682, and *The Earl of Leicester v. Walter*, 2 Campb. 251.

ABBOTT, C. J. I am of opinion that these affidavits cannot properly be laid

before the court. It is perfectly *clear that if we receive those now [*322 offered, we must receive affidavits on the other side in contradiction, and then the court must necessarily be placed in the situation of trying facts relating to the misconduct, real or supposed, of those who constituted a part of his majesty's army, in their absence, and perhaps to their very great injury. It seems to me that the proper course to adopt, in the present stage of the proceeding, is to look at the situation in which the defendant himself was placed at the time he composed and published the libel for which he is now called upon to answer. We should consider ourselves as possessing the same means of knowledge, and no other, of the matters which formed the inducement to the composition itself, which the defendant himself then possessed. He has informed us by his affidavit, that he was induced to write and publish this address to his constituents, in consequence of representations seen in various newspapers, as to something that either had or was supposed to have occurred at Manchester. It seems to me that we should do great injustice to the defendant, if we were to allow ourselves to be induced, for the purpose of aggravating punishment, to receive any affidavits of the falsehood of those representations on which he tells us he was moved to write that which he did. I think, as on the one hand we cannot, with justice to the defendant, receive such affidavits, so on the other hand we cannot receive affidavits which go to show that a great part of the representation contained in those newspapers, which led the defendant to express his feelings thus strongly, was founded in truth. The affidavit made by the defendant himself, stating that his feelings were strongly excited by the statement he had read in the newspapers, *was most properly laid before [*323 us. To that, in forming an estimate of the character of that which was written by the defendant, I shall give its due and proper weight; but I am clearly of opinion that these affidavits now offered cannot be received.

BAYLEY, J. I entertain no doubt that in this case any evidence of the truth of the facts charged in this information is inadmissible. If we were to accede to it, we should let in a most dangerous rule of practice, and one which would be a great disgrace to the administration of justice. The libel in question imports, that the troops had killed men unarmed, unresisting, and had disfigured, maimed, cut down, and trampled on women. If that were done, if unresisting men were cut down, whether by troops or not, it is murder for which the parties are liable to be tried by the law of the country; and I for one will ever uphold this, that a man shall come to his trial fairly, and without any prejudice created upon the public mind in that respect. In *Rex v. Fleet*, 1 B. & A. 379, the publication of depositions taken before a coroner was brought under the consideration of the court, who thought it a ground for a criminal information. For by putting the public into possession of the facts, before the period at which the party is to be put upon his trial, such a prejudice in the public mind may be created, as to make it impossible when the party is afterwards put upon his trial on that inquest, to select a jury whom that prejudice has not reached. The law of England is anxious for the interest of persons against whom charges may be made. If a man commits a crime, there is *a legal and [*324 constitutional mode by which that crime may be brought into discussion. He is liable to be tried, but though his crime may be as great and as aggravated as possible, he ought to have a full, fair, dispassionate, and temperate investigation of his conduct at the time of trial. In this case, the libel imputes that which would be murder, and it charges not any particular individual, but a body at large with the crime. Now it is impossible for a man to read this, even although he may not be able to fix on any of the persons constituting a part of that body, without a degree of irritation being created against them, so that if afterwards they are singled out as the individuals against whom an indictment is preferred, a prejudice, not against them individually, but as having constituted

a part of that body, would probably be raised. Then if the court allow the truth in this case to be laid before them in mitigation of the punishment of a person, who, not in the course of the administration of justice, but as a volunteer, has laid this before the public, they would give to him an opportunity of bringing forward a charge against a body of men ; and if any of the individuals of that body afterwards are put upon their trial for the share they have taken in the transaction, it may be difficult, nay, impossible, that they should have an unprejudiced trial. In the observations I have made, I have confined myself to those cases in which the charge is a charge of an indictable offence. There may, by possibility, be cases in which the publication may be a libel or not, according as the fact be true or false ; and in such cases, where the falsehood is essential to constitute the crime, or the truth is sufficient to do away the crime, as it seems to me, the truth may possibly be received in evidence.

*325] *I do not therefore mean to say that there may not be some cases in which the truth may be brought forward as an answer to the charge, or as a mitigation of punishment. I will put a very plain and familiar case. Suppose that I publish that on such a day a man was convicted of perjury, and the fact was so. Am I then to be indicted for telling the public that he was so convicted of perjury ? I am at liberty to show that he was indicted for the crime, that he was convicted, and that therefore there was no offence in my making that communication to the public of an existing fact. That is one instance, and very probably many other instances ejusdem generis might be put. The case of *The King v. Horne* has been mentioned. It is plainly distinguishable from the case before the court, on the ground that the libel did not impute to any persons there mentioned, that they had been guilty of an indictable offence. It appears to me, upon the whole, that it would be a great obstruction to public justice, and a great stigma on the administration of justice in this country, if, in a collateral way, in a transaction in which the public mind may happen to be interested, any person, by a voluntary publication on his part, should be at liberty to raise the question, whether particular individuals had or had not been guilty of particular crimes, instead of doing so in a constitutional mode, by bringing forward the charges against those individuals openly, and giving them a fair opportunity of defending themselves against the accusation. I think, therefore, that these affidavits cannot be read.

HOLROYD, J. I am also of opinion, that in this case we are bound by law to say, that these affidavits cannot be read. This is a libel which assumes certain facts to "have been stated in the public papers, and certainly the truth *326] that those newspapers had contained those particulars (whether the account given in those papers was correct or not) may legally and properly be offered to the court, in considering the motives and grounds for the impression which produced that publication which is charged as a libel. The libel does not assume to proceed on any facts known to the defendant : but only on information which he has received upon the subject ; and the affidavits now offered are not to show what information the defendant received, and upon which he acted in publishing this libel, but certain matters, the existence of which, if true, formed no ground or motive on which he acted in publishing the letter in question. It appears to me, that it would not be proper for the court to receive affidavits stating that there was no foundation at all for those accounts which were given in the newspapers, and upon which the defendant acted. If, then, that circumstance would not constitute an aggravation of the offence, the contrary ought not to operate in alleviation of it. The falsehood of these accounts does not form any ingredient in the crime for which the defendant is called up for punishment, and therefore it is not to be assumed, that the accounts there stated were false, but only that, not knowing whether they were true or false, upon the reading of those papers, he, with the intent charged in the indictment (which is found by the jury,) published this paper, containing a statement of

the facts, or rather an assumption of the facts as represented in the newspapers, and expressing the irritated feelings of his mind upon the subject. The falsehood, in this case, is no ingredient in the crime charged against Sir F. Burdett. The charge is, that he has published this upon reading these things in a public *newspaper. Whether they be true or whether they be false, he has given vent to those feelings, in order that this matter might be published throughout the kingdom, with a view to call a meeting of his electors, and in order that other public meetings might be held throughout the kingdom. That is the charge for which he is brought up to receive the judgment of the court, in which, as it appears to me, falsehood is no ingredient; we are not to assume that the statements are false, and therefore we are not to receive affidavits to show that they are true, particularly if they go to affect other persons; bodies of men, the particular individuals of whom are not named. It might be necessary perhaps for all those individuals to come with affidavits before it could be said that the charges made by these affidavits were fully answered. The effect on the minds of the public would be most injurious, if, previously to the bringing of persons to trial who have committed offences as charged by this libel, such a publication as this could be permitted. The law of England says, that libels are not to be published respecting persons accused, but they are to come fairly to their trial. It appears to me, that we are by law bound to say, that we cannot receive these affidavits in mitigation of punishment.

BEST, J. I am of the same opinion. This libel imputes the commission of a crime to certain persons composing part of the king's troops, who are stated to have killed or maimed certain subjects of the king. That crime may be either murder or manslaughter, according to circumstances; and if we were to receive affidavits to show that the facts alluded to in this libel were true, we must receive also counter-affidavits on the other side; and we should then try upon affidavit, in *the absence of the parties to whom the crime is imputed, the question of their criminality. A distinction has been taken between giving the truth in evidence at the trial, and giving it in evidence in mitigation of punishment. In my opinion, it is less objectional that it should be received in evidence at the trial, than in this stage of the proceeding; because the matter must now be tried upon affidavit, and every lawyer knows how difficult it is to get at the truth of such matters upon affidavits. The present case is very distinguishable from *The King v. Draper*, to which I have called the attention of the court. The libel of the defendant, there, consisted in a statement of facts within his own knowledge; but that which induced the defendant to publish this libel, was the statement of facts which he read in the newspapers. The truth or falsehood of these facts is not the subject of inquiry here, but the spirit which actuated the defendant at the time of the publication. To judge of that, we must consider his situation at that time, and the means of knowledge which he then possessed. That was wholly derived from the statement he had read in the newspapers; and therefore, in this case, his criminality in publishing the libel in question is neither increased nor diminished by the truth or falsehood of the facts stated to have occurred at Manchester. For these reasons, I am of opinion that these affidavits cannot properly be laid before the court.

The defendant now put in an affidavit, stating that all the different accounts he read in the newspapers, and received elsewhere, of the meeting at Manchester, however they varied respecting the motives and objects of the persons assembled there, did all concur in stating *the fact that no violence, nor any disorderly conduct, had been committed by the people, and that no attempt had been made on the part of the civil power, either to apprehend the speakers or to disperse the crowd; but that an armed body of yeomanry, without any previous notice, rode in amongst an unresisting multitude, and committed the acts stated in the newspapers: and that he, the defendant, had no doubt in his own mind that the statement was true.

The court sentenced him to pay to the king a fine of 2000*l.*, and to be imprisoned three calendar months.

The KING v. DAVISON.

A judge at Nisi Prius has the power of finding a defendant for a contempt committed by him in the course of addressing the jury.

THE defendant was indicted for the publication of a blasphemous libel. At the trial, at the London sittings after Trinity term, before BEST, J., the defendant conducted his own defence, which he read from a written paper. In the course of this, he made several offensive observations concerning the Christian religion, and derogatory to the character of persons who were not present in court to defend themselves. The learned judge warned him of the impropriety of such conduct, and told him he would not allow him to revile the Christian religion, or attack the character of persons not before the court. After this admonition, the defendant, as a reason for his not employing counsel, used this expression : "No barrister will undertake and uphold an honest defence in a cause like mine." The learned judge again interposed, and told him that his conduct was highly improper, and that *he must confine himself, strictly, [330] to matter relevant to his defence, and that, if he departed from that course, he, the learned judge, should be obliged to use the means he had, to restrain him ; to which the defendant replied. "My lord, if you have your dungeon ready, I will give you the key." For that expression the learned judge fined him 20*l.* The defendant afterwards used the following expressions. "The Deist is anathematized, because he cannot believe that some traditions, handed down among the Jews and the Christians, are a Divine revelation, and not only superior to the several and respective revelations possessed by the Turks, the Brahmins, or the Hindoos, and many others, but the only genuine and authentic revelation in existence. Now it so happens, that the Deist considers this collection of ancient tracts to contain sentiments, stories, and representations, totally derogatory to the honour of a God, destructive to pure principles of morality, and opposed to the best interests of society." For these expressions the learned judge fined him 40*l.* The defendant, after that, said, "The bishops are generally sceptics ;" for which the learned judge fined him 40*l.* The defendant having been convicted, Cooper, in Michaelmas term, obtained a rule nisi for a new trial, upon an affidavit, which stated, that, by these fines, the defendant was intimidated and confounded, and omitted some most material parts of his defence, among which were a hundred respectable authorities, selected from the writings of ecclesiastics as well as laymen, in favour of a free toleration, and against every species of persecution, on the score of opinion, which deponent had connected by a chain of reasoning and appropriate remarks ; and it further stated his belief, that, had he been permitted to go on [331] without those interruptions *and fines, which paralyzed his energies, he should have succeeded in making an impression on the jury in his favour, and obtained a verdict of acquittal.

Gurney and Marriott, in Michaelmas term, showed cause. These fines were properly imposed ; the first was for an expression that contained a direct insult to the judge, and therefore, of itself, was a contempt of court. The second fine was for a repetition of the offence for which he was indicted. That was a contempt, therefore, inasmuch as it was a breach of the law committed in the face of the court ; and also was a direct contravention of the order of the learned judge. The last fine was for an attack upon the character of persons not before the court, and was a contempt, as it was in contravention of the order given by the learned judge. These fines, therefore, were all properly imposed, and the necessity for imposing them was created by the misconduct of the de-

fendant himself. He cannot, therefore, make the impositions of those fines a ground for a new trial.

Cooper, contra. A judge has no power to fine a defendant for impropriety in the course of his speech to a jury in his defence. In Viner's Abridgment, more than eighty instances of contempt are given, but there is none of a fine on a defendant for a contempt committed in his defence. Lord COKE, in his 2d Institute, 228, commenting upon the statute of Westminster, says, that it extends only to extra-judicial slanders; and, therefore, if any man bring an appeal of robbery, murder, or other felony, against any of the peers or nobles of the realm, and charge them with murder, robbery, or felony, albeit the charge be false, yet shall they have no action *de scandalis magnatum, neither at the common law, nor upon either of the statutes for the bringing of his action, [*332 nor for affirming the same to his counsel, or attorney, or curitor, for the framing of his writs, or for speaking the same in evidence to a jury. And the reason given is, "that men should not be deterred to take their remedy by due course of law." Now, if a man is not to be deterred by the fear of an indictment for libel, or an action for scandal, from prosecuting public offences, or the assertion of his civil rights, much more ought a defendant, in a case like this, to be free from all risk and fear. If men are to be free from all intimidation that may make them hesitate to promote public justice, by prosecuting others, surely they are to be equally unrestrained by any fear of consequences from what they may say in defence of themselves. This has always been received and acted upon as law, and that too even by the Star Chamber. The case of *Bastwick, Burton, and Prynne*, 3 Howell's State Trials, 714, is an authority to show that a party cannot be prosecuted or sued for any thing alleged by him as a party in a cause. Now where an indictment will not lie, a judge cannot fine for contempt. As a defendant cannot be indicted for scandalous matter on third persons spoken in his own defence, it follows that he cannot be fined. For if a judge could fine him, and so punish him summarily, the higher mode of punishment would be possessed, when the lower was wanted, which would be an absurdity. No such power ever was exercised by a judge till the present instance, and the non-exercise of it is sufficient to show that it is against law. On the other hand, there are instances where defendants have used the most contemptuous expressions in the course of their defence, and yet no fine has been imposed; Sir Walter Raleigh's *case, 2 Howell's State Trials, [*333 p. 15, *Colonel Lilburne's case*, 4 Howell's State Trials, 1291, are in point. In the case of *Bastwick, Burton, and Prynne*, 3 Howell's State Trials, 722, *Bastwick* reproached the bar for want of independence in addressing the court, imputed impiety to the bishops, and directly attacked the court itself. The conduct of Lord ELLENBOROUGH, C. J., in *The King v. Eaton*, and that of ABBOTT, C. J., in *Rex v. Carlile*, are strong negative authorities to show that no such power exists.

ABBOTT, C. J. If I thought that the decision I am about to pronounce, could have the effect of restraining any person who may hereafter stand on his trial, from making a bold, as well as legitimate course of defence, I would pause before I pronounced that decision. The question, indeed, is a momentous one. It is absolutely a question, whether the law of the land shall, or shall not continue to be properly administered. For it is utterly impossible that the law can be so administered, if those who are charged with the duty of administering it, have not power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the judges, not for their personal protection, but for that of the public. And a judge will depart from his bounden duty, if he forbears to use it when occasions arise which call for its exercise. I quite agree that this power, more especially where it is to be exercised on the person of a defendant, is to be used with the greatest care and

moderation. But if the publication of blasphemy and irreligion cannot in any other way be prevented, in my opinion, a judge will betray his trust who does not put it in force. An allusion has been made to my own personal *conduct on a former occasion. I have often doubted, whether I did not in that case permit too much to be done; but I thought then, that it was better to err on the side of forbearance. The question here is, if a judge, sitting at nisi prius, has power to impose a fine on a defendant for a contempt? That he has power to do so, I can entertain no doubt; no lawyer can doubt the power of every court to fine for contempt. As to the particular occasion on which these fines were imposed, I disclaim any right to judge of it; but I should be wanting to myself and my feelings, as well as my duty to others, if I did not say, that, in the view that I have taken of this case, it is most manifest that the defendant came into court with an express design to revile the Christian religion. It became the duty of the judge to prevent him from so doing, by the imposition of a fine, when he found that remonstrance had not that effect. Can we collect from any thing now before us, that the effect of that was to stop the defendant in any legitimate course of defence whatever, or to deprive him of the means of urging any topic to the jury which could have led them to pronounce a verdict other than they did? The publication of the papers was proved beyond doubt, and their meaning is not made the subject of any question. The object the defendant seemed to have in view, was to reassert the substance of the sentiments contained in those papers, and to maintain that he had a right to do so. Is a judge to sit and hear a man maintain his right to assert or publish blasphemy? Can the law be administered, if the affirmative of that proposition be for a moment admitted? I am quite confident that it cannot.

*335] But what is it that this defendant has been restrained from *doing? Looking at his own affidavit, he says, that his paper contained a great deal more, that some part of it, in his judgment and belief, was fit and proper to be submitted to the consideration of the jury, because it contained the sentiments and opinions of many learned persons as to the impropriety of prosecution for religious opinions. But how was that in any degree relevant to the point in question? Upon the whole, I think that the law cannot be properly administered, unless this power of fining exists, and that the exercise of it, on the present occasion, was called for by the conduct of the defendant; and, being perfectly satisfied that the effect of it was not to deprive the defendant of any thing that might have served him in his address to the jury. I am clearly of opinion that we ought not to grant a new trial.

BAYLEY, J. I entirely agree with my lord chief justice, that in this case there ought not to be a new trial. The question is shortly this, whether, for the future, decency and decorum shall or shall not be preserved in courts of justice; or whether, under colour of defending himself against any particular charge, a defendant is at liberty to introduce new, mischievous, and irrelevant matter upon his trial. I agree that a defendant, in all cases, should have every facility allowed him in his address to the jury, provided he confines himself within those rules which decency and decorum require. In every case, the subject of discussion before the jury is to be considered, and a judge is bound to see that the arguments which are adduced, are such as are consistent with decency and decorum, and not foreign to the matter on which the jury have to decide. When a case is conducted by counsel, they know *perfectly well what the rules of law are, and they have that regard for their own character which generally prevents them from doing any thing which may break in upon the rules of decency and decorum. They have also sufficient knowledge (arising from their experience and education,) to form a judgment whether the matter be relevant or not. But defendants are not in the same situation in which counsel are; they have not the same character to maintain, and are not always so well informed as to know what is relevant or irrelevant. But every

man who comes into a court of justice, either as a defendant or otherwise, must know that decency is to be observed there, that respect is to be paid to the judge, and that, in endeavouring to defend himself from any particular charge, he must not commit a new offence. Of the power of a judge to fine for a contempt of court, I have not the least doubt, and I am of opinion also, that the judge alone is competent to determine whether what is done, be or be not a contempt; and that neither this court, nor any other co-ordinate court, has a right to examine the question, whether his discretion, in that respect, was fitly and properly exercised. If, indeed, the judge were to use his power corruptly, he would be liable to an impeachment. If, in this instance, I were at liberty to express an opinion on the propriety of the fines in question, I should certainly say, that I see no reason whatever to be dissatisfied with the exercise of that discretion. I think the conduct of the defendant called for the interposition of the judge; and that he would have abandoned his duty to the public, if he had not interposed. The question for us to consider is, whether the actual exercise of that power did, in this particular instance, produce such an effect on the defendant as to give him a fair and reasonable ^{*}ground for making an application to the discretion of this court, in order to have a new trial. Now, in considering that, we must of necessity look to the conduct of the defendant himself at the time when he was fined; for if we find, as in the present case, that his conduct was improper, then we cannot interfere in his behalf, for it is his own fault, if he has been deprived of the means of laying before the jury that which might have been a legitimate ground of defence. We must also consider whether it is probable that he has been precluded from urging that which might have operated upon the minds of the jury, so as to induce them to come to a different conclusion, because, unless that was so, it furnishes no ground for a new trial. Now it is not suggested to us, that it is probable that the defendant was precluded from insisting on any thing which might have had a favourable effect on the minds of the jury. When I look at the libel in question, and the evidence of the publication of the two papers, it seems to me to be utterly impossible to suppose, that any thing could have induced the jury to come to a different conclusion from that at which in this case they did arrive. And thinking as I do upon that point, it seems to me, that it would be a perfect abandonment of our duty, if, in this case, we were to accede to the present application.

HOLROYD, J. I am also clearly of opinion that we should not be justified in granting a new trial. All the cases on this subject, with respect to the power of courts of record to fine and imprison for contempt, are collected together very ably by Mr. Justice WILMOT, with a view to a judicial opinion, in the *King v. Almon*, Wilmot's Notes, 243. ^{*}As far as I can in this case enter into the consideration of the subject, as to the propriety of the fines in question, I think the judge was fully justified in imposing them, and not only fully justified, but was called on in the discharge of his duty to impose them, in order to prevent the line of defence in which it manifestly appears the defendant was determined to proceed, even after a warning had been given to him to desist. The judge had the defence of the law intrusted to him, and he must either have permitted a breach of it, in which case I think he would have abandoned his duty, or he must have fined or imprisoned the party. If he had imprisoned the party as for a contempt, that might have had a worse effect on the defendant, and the only course, therefore, which he could take, was that of fining. After the first fine was imposed, one should have supposed that it would have prevented a repetition of the offence; but it seems as if there was a direct design to set at defiance the law, for the defendant said that he would persist in that course of defence. Now, what is that line of defence? The defendant is called upon to answer for a crime for publishing a blasphemous libel. In such a case, instead of defending himself by showing that he is not guilty, or

has done it under such circumstances as will justify his act, he chooses to justify the thing itself, and says that he will persist in the blasphemy. That is an offence at law committed in the face of the court. Then is the judge, whose sworn duty it is to punish crime when established by proof, and brought before him judicially, to sit and hear the law defied, and suffer a crime, a repetition of the same crime, to be committed in his presence? The law arms him with an authority to fine and imprison a person for so doing, and makes it incumbent [339] on the *judge so to act. In the case of an insult to himself, it is not on his own account that he commits, for that is a consideration which should never enter his mind. But, though he may despise the insult, it is a duty which he owes to the station to which he belongs, not to suffer those things to pass which will make him despicable in the eyes of others. It is his duty to support the dignity of his station, and uphold the law, so that, in his presence at least, it shall not be infringed. I think the judge in this case was justified in stopping the defendant in this line of his defence, and was justified in fining him for persisting in it. I mention these things, because it is said, that, supposing the judge had the power, he may have improperly used it, and that if that was the case, it might be a ground for letting the defendant have a new trial, and that by the imposition of the fines, the defendant became embarrassed, and had not such advantages of making his defence as he otherwise might have had. But in this case, if any embarrassment arose, it was owing to his own pertinacity, and his determination to go on against the law. I can see no ground for granting a new trial. He does not now state in his affidavit any legal defence which he was prevented from making, nor lay any thing before us which can induce any reasonable person to consider that the verdict could have been otherwise. It would at all events be necessary for him to show, that he had some grounds of defence which might have induced the jury to come to a conclusion in his favour. He has not done that by his affidavit. Agreeing, as I do, with the rest of the court, upon the power to fine, I am of opinion that we ought not to grant a new trial in this case.

[340] *BEST, J. No man who pretends to any knowledge of the law can doubt, that a judge of a court of record has authority to fine or imprison for any contempt, committed in the face of the court. From the earliest period of our history, this authority has been exercised. The year-books record instances of such commitments, and there are similar instances in other books of reports. At those times when our ancestors have abolished or restrained improper authorities, they have not touched this, because they found it essential to the due administration of justice. A court of nisi prius is a court of record, and the judge presiding in it is therefore invested with the power of committing for contempt. If, however, it is made to appear to the court, from which the record was sent, that, by the improper imposition of such fines, a defendant who defended himself, has been prevented from making a full and fair defence, that court ought to grant a new trial, although, strictly speaking, punishments for contempt cannot be inquired of in any other court than that by which they were imposed. For the same superintending authority which gives the court in bank a power of preventing injustice from any error of the judge at nisi prius, must enable the court to inquire, whether the improper infliction of a fine has restrained a defendant from offering either evidence or observations to a jury proper to be submitted to them. But if the fine be proper, a defendant cannot be allowed to complain of the effect that the imposition of it has occasioned to him. This would enable a party to take advantage of his own delinquency. I conceive that I had authority to fine the defendant for any insult offered to me, or for transgressing any proper rule laid down by me for the decent and orderly conduct of the cause. I was satisfied that *this defendant, from his manner, and the language he used in the beginning of his defence, was desirous that I should commit him. I told him that, besides

the power of committing, I had that of fining, and that I should exercise this power, if he offered me any insult; if he attacked the truths of Christianity, or calumniated parties not before the court. For the grossest violations of this order, which I have already stated to the court, I fined him three times. He submitted himself to my authority, and I ordered the fines to be taken off. Whatever it might have been fit to do in the case of *The King v. Carlile*, I think I could not, with propriety, have acted otherwise than I did on this occasion. It has, since Carlile was tried, been seen, that persons indicted for libels, who defend themselves, think that they may insult the judge, calumniate all who are in authority in the country, and utter blasphemy more horrible than that for which that defendant was convicted. I am therefore clearly of opinion, that there is no ground for this application for a new trial, and that this rule ought to be discharged.

Rule discharged.

JOHN ROBINSON FRANKLIN, DANIEL BRENT, WILLIAM SIMS,
JAMES SIMS, and JACOB SIMS, - - - - Plaintiffs;

AND

JOHN HOSIER and Others, Assignees of the Estate and Effects of WILLIAM MASSON a Bankrupt, - - - - Defendants.

A shipwright has a lien upon a ship for repairs.

SAMUEL BRENT, the elder, Daniel Brent, John Brent, and Samuel Brent, the younger, in the year 1812, carried on the business of shipwrights, in copartnership *together, at Rotherhithe, in the county of Surrey. In the month of July, 1812, a ship called The Northumberland, whereof the said John Robinson Franklin, Daniel Brent, William Sims, Jacob Sims, William Masson, and James Masson, were owners, and the said William Masson, was managing owner, returned to the port of London from the East Indies, and requiring considerable repairs; she was, after discharging her cargo, put or sent by the said William Masson, as such managing owner, into the dock-yard of the said Samuel Brent and Co., for the purpose of being thoroughly repaired, and they, by the direction of the said William Masson, duly repaired the said ship. William Masson, shortly prior to such repairs being completed, stopped payment, and on the 19th of January, 1813, a commission of bankrupt issued against him, under which he was declared a bankrupt, and at the time of his failure and bankruptcy, the Northumberland was in the actual possession of Samuel Brent and Co., in their dock, for the purpose aforesaid, and they refused to part with the possession of the ship, alleging that they had a right to detain her until the amount of the repairs should be paid.

The question directed by the lord chancellor for the opinion of the court was, whether Daniel Brent, John Brent, and Samuel Brent, the younger, and their late deceased partner, Samuel Brent, the elder, as shipwrights, having the said ship Northumberland in their actual possession, in their dock, at the time of the bankruptcy of William Masson, the managing owner of the said ship, had a lien on the said ship for the repairs of the said ship. The case was argued in last Michaelmas term, by

Campbell, in support of the lien. It may be laid down as a general rule, that every artificer has a particular *lien on a chattel which has been delivered to him in his business, and on which he has expended his labour. [343] The law inclines against general liens, but considers particular liens as founded in justice and favourable to trade. Accordingly they have not been confined to cases in which an obligation is created by law to do the act from which the debt to be secured arises, as in the case of carriers and innkeepers, but they have been established in every trade in which they have been questioned. In all

the cases in which the existence of a general lien in any particular trade has been debated, the existence of a particular lien has been admitted. *Ex parte Deeze*, 1 Atk. 228. In *Ex parte Shank*, 1 Atk. 234, Lord HARDWICKE assumes that a ship-carpenter has such a lien while the ship remains in his possession. In *Raft v. Mitchell*, 4 Campb. 146, Lord ELLENBOROUGH held, that a ship-carpenter has no lien where the repairs are done to the ship on credit, which is inconsistent with lien; but here the money for the repairs is alleged to have been due, while the ship remained in the possession of the carpenters. The last case on the subject is *Ex parte Bland*, 2 Rose, 91, and there Lord ELDON says, "The principle which regulates the present application, I find accurately laid down by Mr. Abbott: (a) where the repairs are executed in a port in this country, the vessel, till parted with, is specifically chargeable with their amount, but the lien is lost with the possession."

Littledale, contrà. The chancellor must at least have entertained doubts upon the subject, by sending the case here. A distinction may be taken between ships and other *chattels; for ships generally bear an infinitely greater proportion to the repairs done upon them, than other chattels delivered into the possession of an artificer; and it is a matter of public importance, that they should be employed in navigation, rather than rot in the carpenter's dock. Here an additional difficulty arises from one of the ship-carpenters being likewise a part owner of the ship; and it is impossible, under these circumstances, to say, that he has a legal lien against himself.

Cur. adv. vult.

The following certificate was afterwards sent to the lord chancellor.

This case has been argued before us by counsel, and we are of opinion that Daniel Brent, John Brent, Samuel Brent, the younger, and the deceased Samuel Brent, as shipwrights, having the said ship Northumberland in their actual possession in their dock at the time of the bankruptcy of William Masson, had a lien on the whole ship or vessel called the Northumberland.

C. ABBOTT.
J. BAYLEY.
G. S. HOLROYD.
W. D. BEST.(b)

(a) Abbott on Shipping, 184.

(b) [See 4 Wheaton's Rep. 438; the *The General Smith*, Yelv. 67, in *notis* (Metcalfe's ed.)]

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Easter Term,

IN THE SECOND YEAR OF THE REIGN OF GEORGE IV.

*PAGE, Assignee of EHRENSTROM, a Bankrupt, v.
BAUER.(a)

[*346

In assumpst by the provisional assignee of a bankrupt, defendant pleaded the general issue : *Held*, that the fact of the bankrupt's estate having been assigned by the provisional assignee to the new assignees, between the time of issuing the latitat and the delivery of the declaration, is no ground of nonsuit upon a plea of non-assumpst. *Quare*, Whether it would have been an answer to the action, if specially pleaded ?

ASSUMPSIT upon promises to the bankrupt before his bankruptcy, and also to the assignee after the bankruptcy. The plaintiff was the provisional assignee appointed under the 5 Geo. 2, c. 30, s. 30. The latitat was sued out during the time that he continued assignee ; but before the declaration was delivered, the new assignees were appointed, and all the bankrupt's property duly assigned to them. This action was continued by them for the benefit of the creditors. The cause was tried before BEST, J., at the London sittings before last Michaelmas term ; and it was contended, that as the property of the bankrupt had passed from the plaintiff before the declaration, he had no cause of action whatever. BEST, J., was of opinion that that was no matter of defence upon the general issue, and he directed the jury to find a verdict for the plaintiff, with liberty for

(a) By the 1 & 2 G. 4, c. 16, it is enacted, " That it shall and may be lawful to and for the judges of this court, or any three or more of them, and they are required, unless prevented by illness, public business, or other reasonable cause, to meet at Serjeants' Inn Hall, or at some convenient place in Westminster, according to their discretion, on the Tuesday fortnight, or some subsequent day before Easter term then next ensuing, and also on the 20th day of October and the 10th day of January forever hereafter, unless either of the said last-mentioned days shall be a Sunday, and then on the following day ; and also on some day, to be by them appointed, before every other Easter term, if the time of the circuits shall so permit, and to sit on the several days hereinbefore appointed, and so on from day to day (Sundays excepted) until the commencement of the term next following, for the dispatch of all such matters as now are, or, at the end of any term preceding the said respective days, hereafter may be depending in the said court, whether on the crown or plea side thereof, and to hear, decide, and pronounce rules, orders and judgments upon all such matters ; which rules, orders, and judgments shall be drawn up and entered of record, either as of the term last past before the pronouncing thereof, or as of the term then next ensuing, as the said judges shall direct ; which said meetings of the said judges shall be called *The Sittings before Term*."

The judges of this court sat at the Sessions' House, Westminster, from Wednesday, April 25th, until the term. Holroyd, J., was absent during the first six days, in consequence of the severe indisposition of his son.

the defendant to move to enter a nonsuit; and a rule nisi having been obtained for that purpose in last Michaelmas term,

Gurney and *Barnewall* now showed cause. The fact of the bankrupt's estate having passed to new assignees, *after the suing out of the writ, and before the declaration, would not, even if specially pleaded, furnish an answer to this action. If it would, the object of the appointment of a provisional assignee under the 5 Geo. 2, c. 30, would be defeated; for by s. 30, the commissioners are authorized, "for the better preserving and securing the bankrupt's estate," immediately to appoint a provisional assignee. Such appointment, however, would not tend to the better securing of the bankrupt's estate, if actions commenced by such assignee were necessarily to be defeated by the appointment of the new assignees. An action commenced for the very purpose of saving the statute of limitations might thus be defeated. The debt for which such action might be commenced cannot be excepted out of the property assigned to the new assignees; for the provisional assignee is bound by the words of the statute to assign to the new assignees *all* the estate and effects of the bankrupt. *Hewit v. Mantell*, 2 Wils. 372, and *Waugh v. Austen*, 3 T. R. 437, are authorities to show that the bankruptcy of the plaintiff, after the commencement of the action, does not abate the suit; yet, in that case, the property is wholly divested out of the bankrupt from the time of the act of bankruptcy. Admitting, however, that this would be an answer to the action, if specially pleaded, it is clear that the defendant cannot avail himself of it upon the plea of the general issue. It is a settled rule in pleading, that matter of defence arising after action brought cannot be pleaded in bar of the action generally, *Le Brett v. Papillon*, 4 East, 507. In *Morgan v. Painter*, 6 T. R. 265, the plaintiff *took husband after suing out the writ, and before the declaration; and it was held that the defendant could not give the coverage in evidence under the general issue, but must plead it in abatement. Here, the property of the bankrupt was vested in the plaintiff at the time of suing out the latitat; and *Wood v. Newton*, 1 Wils. 141; *Johnson v. Smith*, 2 Burr. 950; *Bridges v. Knapton*, 2 Burr. 965, and *Hardymann v. Whitaker*, 2 East, 574, are authorities to show that the issuing of the latitat may be considered as the commencement of the suit.

Marryat and *F. Pollock*, contrâ. The fact of the bankrupt's estate having passed to the new assignees before the delivery of the declaration would undoubtedly have been an answer to this action, if specially pleaded. *Kinnear v. Tarrant*, 15 East, 622, is an authority to show, that in scire facias against bail it is competent to the defendant to plead in bar against the issuing of execution, that before the issuing of the writ of alias scire facias the plaintiff became bankrupt, and a commission issued against him, on which he was declared a bankrupt before the return of the writ, and his effects, debts, &c., assigned to the provisional assignee, who, before plea pleaded, assigned to the assignee under the commission, who was entitled to sue the defendants, &c. The ground of that decision was, that the plaintiff had no property in the subject-matter, in respect of which the action was brought. It is an authority therefore expressly *349] in point, to show that this action could not be *supported, if the defendant had pleaded specially that the estate of the bankrupt had passed out of the plaintiff before declaration. Secondly, the defendant may avail himself of this matter of defence upon the general issue; for the 5 Geo. 2, c. 30, s. 30, enacts, "That all the estate and effects of the bankrupt, which shall be delivered up or assigned by the provisional assignee, shall be, to all intents and purposes, as effectually and legally vested in the new assignees as if the first assignment had been made to them by the commissioners." Now, if the assignment had been made in the first instance to the new assignees, the plaintiff would not have had any cause of action. This is distinguishable from *Morgan v. Painter*, 6 T. R. 265, for there the matter insisted on was only the subject

of a plea in abatement, where the defendant gives the plaintiff a better writ; but the matter of defence insisted on here shows that the plaintiff had no right of action at all. The declaration, too, may be considered as the commencement of the action; for a plaintiff may include in his declaration any debt accruing after the suing out of the writ, and before the term of which the declaration is entitled. The writ is only considered as process to bring the defendant into court.

ASSOTT, C. J. The rule is, that the plaintiff shall recover where the general issue is only pleaded, if it appear that he had a cause of action at the time of the issuing of the writ. There is no special plea upon this record. Unless, therefore, the act of parliament which has been referred to, makes this case an exception to the general rule, the plaintiff is entitled to recover. By the *5 [**350 Geo. 2, c. 30, s. 30, "all the estate and effects of the bankrupt, which shall be delivered up or assigned, shall be, to all intents and purposes, as effectually and legally vested in such new assignee, or assignees, as if the first assignment had been made to him or them by the commissioners." It has been argued, that this clause has the effect of entirely annihilating the interest which the provisional assignee had at the time of issuing his writ. In construing this clause, we ought, however, to consider the object of the statute, which was to enable the assignee to obtain the possession of all the bankrupt's property, in order to distribute it among the creditors. If we were to hold, that the effect of the assignment to the new assignees is to defeat an action commenced by the provisional assignee, we should thereby in part defeat the object of the legislature; for a party against whom an action is so commenced might thus be enabled, before the appointment of the new assignees, to remove himself out of the reach of the process of the court. It is unnecessary, however, to say what the effect of such a defence would be, if specially pleaded. It is sufficient to say, that under this plea the defendant cannot avail himself of this defence.

BAVLEY, J. There is a privity between the provisional assignee and the assignees who are afterwards appointed, in the same manner as there is a privity between one assignee, who is afterwards removed, and the person who is substituted in his place. *De Cosson v. Vaughan*, 10 East, 61. In this case, it is material to consider the situation in which the plaintiff stood at the time when the action was commenced. Now a *plaintiff is at liberty to consider the suing out of the writ as the commencement of the action. It [**351 is true, that in some cases he is entitled so to consider the time when the declaration is delivered; but there is no case in which he is compelled to consider the declaration as the commencement of the action, in opposition to the period of time when the writ was sued out. Here then the plaintiff had a cause of action vested in him as assignee of the bankrupt, at the time when the action was commenced. A circumstance afterwards occurs between the issuing of the writ and the declaration, which would have taken from the plaintiff the right of suing at all, if it had happened at an antecedent period. It seems to me, however, that that having taken place at a subsequent time is no answer to this action upon the plea of the general issue. The defendant does not, indeed, deny, that the assignee of the particular bankrupt has a cause of action; but the defence is, that the plaintiff is no longer his assignee; and, therefore, by a circumstance which has occurred in the course of the suit, there is a disability in him to sue. That fact, however, as it appears to me, ought to have been specially pleaded, and cannot be given in evidence under the general issue. I cannot distinguish this from the case of a plaintiff who has commenced a suit, and afterwards becomes bankrupt: his assignee is entitled to continue the suit, in the name of the bankrupt; yet, in that case, all his rights are vested in the assignee from the time of the act of bankruptcy. Unless, however, those facts are specially pleaded, the assignees are entitled to continue the suit in the name of the bankrupt. It seems to me, therefore, upon the same principle, that in

this case the right of action having been once vested in the first assignee, the *other assignees are at liberty to go on with the suit, unless the defendant, by a special plea, insist that the suit should be carried on in the name of another. I think, therefore, that this rule should be discharged.

BEST, J. At the time of the trial, I was much struck with the inconvenience that would frequently arise, if a provisional assignee might not maintain and continue an action. It is useful to appoint a provisional assignee, either to protect the property against an extent, or to sue a debtor about to remove himself out of the process of the court. I therefore entertain great doubt whether the fact of the property of the bankrupt having been transferred to other assignees, subsequent to the commencement of the suit, would be a subject-matter of defence, if specially pleaded. I am quite clear, however, that upon this plea of the general issue it is no defence; and, therefore, I think that this rule ought to be discharged.

Rule discharged.

WEBSTER and Another v. SEEKAMP and Others.

A ship-owner is liable for necessary repairs done to a ship by the master's order; and the word "necessary" means such as are fit and proper for the vessel upon her voyage, and such as a prudent owner himself, if present, would order.

ASSUMPSIT by plaintiffs, brass-founders at Liverpool, to recover the amount of their bill for coppering a ship, of which the defendants, who resided at Ipswich, were owners. In September, 1819, the vessel was at Liverpool, bound *353] on a voyage to Newfoundland and the Mediterranean. The captain of the ship ordered the plaintiffs to copper her; and it was proved that, although it was extremely useful to copper vessels bound to the Mediterranean, it was not absolutely necessary, for many vessels went to the Mediterranean without being coppered. At the trial, before **BEST, J.**, at the London sittings before Michaelmas term, it was contended that the owner of a ship was liable only for contracts made by the captain in respect of stores or repairs that were absolutely necessary; and, therefore, that the defendants in this case were not liable. The learned judge left it to the jury to say whether the coppering was useful and proper for a vessel about to proceed on a voyage to Newfoundland and the Mediterranean, and whether it were such as a prudent owner himself, if present, would have ordered. The jury found that it was, and the plaintiff obtained a verdict. A rule nisi for a new trial having been obtained, in Michaelmas term,

Gurney and **Littledale** now showed cause. The owners are liable for any necessary supplies furnished, or repairs done by the master's order. Abbott on Shipping, 4th edit. p. 127. The term *necessary* means what is reasonably fit and proper for the occasion. So, also, an infant is liable for necessaries, which means such things as are suitable to his degree, estate, and condition; for that is the language of the replication to a plea of infancy.

Prinsep, contra. The question left to the jury was, whether the supplies furnished were such as a prudent owner, if present, would have ordered. The true question, however, was, whether they were absolutely necessary; and **Carey v. White**, 5 Brown's Parl. Ca. 325, Abbott on Shipping, 4th edit. 129, is an authority to show that the liability of the owner depends upon that fact.

***ABBOTT, C. J.** The general rule is, that the master may bind his owners for necessary repairs done, or supplies provided for the ship. It was contended at the trial that this liability of the owners was confined to what was absolutely necessary. I think that rule too narrow, for it would be extremely difficult to decide, and often impossible, in many cases, what is absolutely necessary. If, however, the jury are to inquire only what is necessary, there is no better rule to ascertain that, than by considering what a prudent

man, if present, would do under circumstances in which the agent, in his absence, is called upon to act. I am of opinion, that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered, if present at the time, comes within the meaning of the term "necessary," as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable. I think, therefore, that the question in this case was properly left to the jury, and that this rule ought to be discharged.

BAYLEY, J. The captain of a ship, as agent for the owners, has a general authority to act for them. They ought not to appoint a man upon whose compliance with their orders, and on whose prudence and discretion they cannot rely. The owners are responsible for any thing ordered by him for the ship within the scope of his general authority. *Now I think, it is within [*355] the scope of his authority to order such repairs or supplies as it may reasonably be supposed that the owners, if they had had an opportunity of deciding for themselves, would have ordered; and I, therefore, think that this rule should be discharged.

BEER, J. I thought at the time of the trial, and continue to think, that the rule then contended for was much too narrow. It is a rule which can never be enforced, and cannot, therefore, be a safe rule to be acted upon in cases of this sort. No man can say what is *absolutely* necessary. If the topmasts were lost, a vessel might sail without them, and possibly perform her voyage with safety. A topmast might, therefore, be said not to be *absolutely* necessary. Yet no prudent man would proceed to sea without it. If, therefore, that rule is not the proper one, I know no other than that which was left to the jury in this case, viz., what repairs were proper or necessary. The mode of ascertaining that, is to ask, what a prudent owner himself would do if present. The case of *Carey v. White* is very distinguishable from the present; for there, money was supplied to the captain, and he had the opportunity of applying it to any purpose which he thought proper, which is a very different case from that of necessary repairs done to a ship. I am, therefore, of opinion that this rule ought to be discharged.

Rule discharged.

*DAVIE v. MITFORD and Others.

[*356]

A bankrupt, on the day appointed for his last examination before the commissioners, promises to produce a balance-sheet if further time be given. Several adjournments take place, during a period of ten months, at which adjournments he represents an account in writing to be necessary, in order to make the discovery required of his estate and effects; and he promises from time to time to produce the balance-sheet. That not being produced at the last adjournment, and no sufficient reason being given by him for not producing it, it was held that the commissioners were justified in committing him.

Sembie, That by the 5 G. 2, c. 30, s. 1, the bankrupt is bound to render to the commissioners, if requisite, an account in writing of his estate and effects.

ACTION for false imprisonment. **Plea,** not guilty. The plaintiff was duly declared a bankrupt under a commission issued against him in September, 1818. The defendants were commissioners of bankrupt. The question was, whether they were justified in committing the defendant to prison under the circumstances of the case. The cause was tried before **BAYLEY, J.**, at the London sittings after Trinity term, 1820. It appeared in evidence that on the 14th November, 1818, which was the day appointed for the last examination of the bankrupt, questions were put by the commissioners, and answers given, as follows: **Q.** Where is your balance-sheet? **A.** I have none prepared. **Q.** Where is the statement of your property? **A.** I have none prepared. **Q.** As this is the day appointed for your last examination, why are you not prepared with a statement of your account? **A.** Having committed no act of bankruptcy, I considered that it would not be required, as I had hoped for an adjournment. **Q.** Do you wish

this meeting to be adjourned for a fortnight, that you may prepare a statement of your accounts? A. I beg leave to repeat my protest against the validity of this commission. I cannot be prepared within the time mentioned; but if the examination is adjourned for a sufficient period, I am ready to furnish the assignees with any information in my power respecting the estate and effects, without prejudice; and I will prepare my accounts. In consequence of this there was an adjournment of his last examination to the 5th day of December, 1818, when he again prayed further time, and stated that he would apply himself constantly to the making up and balancing of his accounts. On the next and three following adjournments he did not attend, on the alleged ground of illness. On the 25th of May, 1819, the question as to the balance-sheet being repeated, he stated that he was not then ready, but again promised to prepare himself with it; and added, that he was not then prepared to make any further disclosure of his estate and effects, but was ready to answer any questions. On the 7th June, he stated that he wanted more time to prepare his balance-sheet; and being asked what was the amount of the debts due to him? he answered, "My accounts not being made up, I cannot say; I think they amount to 10,000*l.* I cannot say whether they amount to 15,000*l.*; but I think not so much as 20,000*l.*" The meeting was then adjourned to the 8th July, on his promising to furnish a full statement of his accounts, and a proper balance-sheet, to his assignees, by the 25th June. On the 8th July he said his balance-sheet was not finished, but was in progress; and the meeting was further adjourned to the 10th of August, on his promising to furnish the balance-sheet to his assignees by the 30th of July. On the 10th of August, he said his balance-sheet was not yet prepared, and then the following question was put: Have you, since the 30th of July, when you failed to fulfil your promise of furnishing the balance-sheet to your assignees, made any communication to them on the subject of that balance-sheet? A. "I have not failed in my promise, nor have I made any communication to any one; my balance-sheet not being yet finished, I have not seen it necessary." Q. Is that the only answer you mean to give to that question? A. "I have given, and will still give every diligence to make up my balance-sheet as soon as possible, the accounts being very voluminous, and therefore I could not do it before." Upon this the defendant was committed for not giving satisfactory answers. The learned judge was of opinion, at the trial, that the defendants were not justified in committing the bankrupt; he, however, reserved the question for the opinion of the court, whether, under the circumstances, the commitment was lawful. The jury found a verdict for the plaintiff; damages, 200*l.* A rule nisi for entering a nonsuit having been obtained in last Michaelmas term,

Adolphus and F. Pollock now showed cause. The defendants were not justified in committing the plaintiff to prison under the circumstances of this case. By the 5 Geo. 2, c. 30, s. 16, the commissioners of bankrupt are authorized to commit the bankrupt to prison in three cases only, viz., where he refuses to answer, or does not answer to the satisfaction of the commissioners, or refuses to sign his examination. Here the ground of commitment was, that the bankrupt refused to produce a balance-sheet. That is not a case, therefore, within the statute; and the defendants were not justified in their commitment. It is true that, by s. 4, the bankrupt is bound to assist the assignees in making up his accounts; but if he refuses so to do, the commissioners have no power to commit him. The circumstance of the bankrupt, in this case, having promised, from time to time, to prepare a balance-sheet, cannot give to the commissioners a power of commitment, which they did not otherwise possess; besides, the proposition of a balance-sheet never proceeded from him, but from the commissioners.

Marryat, Gaselee, Montague and Wilde, contrâ. The bankrupt was in fact committed in this case for refusing to answer questions lawfully put to him

in order to obtain a full and true disclosure of his estate and effects, within the meaning of 5 Geo. 2, c. 30. By s. 1, he is bound to make such full and true disclosure of his estate and effects, even without any questions being put to him by the commissioners for that purpose. It is clear, however, that the commissioners may lawfully put such questions to him, and if he does not give satisfactory answers, that they may commit. If, therefore, in this case the commissioners had asked him, upon interrogatories, of what his estate and effects consisted, what debts were due to and from him, what his capital originally was, and what his expenditure had been, he would have been bound to give satisfactory answers to such questions. A balance-sheet, in fact, contains a statement in writing which would form answers to such questions. The bankrupt here, in his examination, represented an account in writing to be absolutely necessary, in order to enable him to give a full disclosure of his estate, and he promised, from time to time, to produce a balance-sheet. The reasons given by him, from time to time, for not producing it, are unsatisfactory. *Stanley Goddard's* (^(a)) case is an authority to show, that the bankrupt, having consented to give a balance-sheet, ^{*}is bound to produce it. The bankrupt, therefore, in this [*360 case, not having given satisfactory answers to the question put to him by the commissioners, relative to his producing a balance-sheet, in effect has declined to answer questions lawfully put to him by them, relative to the disclosure of his estate and effects. They were, therefore, justified in committing him. The statute itself clearly contemplated that the discovery of the estate and effects to be given by the bankrupt should be in writing: for the fifth section enables him to inspect his books, and to take with him two persons to make extracts from thence, the better to enable him to make a full and true disclosure and discovery of his estate and effects; and the sixth section, which provides for the case of the bankrupt's being in prison, directs that the assignees shall appoint one or more persons to attend him, from time to time, and produce to him his books, papers, and writings, in order to prepare his last discovery and examination, according to the directions before mentioned, a copy whereof, viz., (of his last discovery and examination,) the assignees shall apply for, and the bankrupt shall deliver to them, ten days at least before his last examination. It is clear, therefore, that in the case of the bankrupt being in prison, he is bound to furnish to the assignees an account in writing of his estate and effects; and that affords a very strong argument that the discovery required to be made by the first section should be in writing. Where, indeed, a bankrupt has been concerned in extensive commercial dealings, he can hardly make a full and true disclosure of his estate and effects, without reducing it into the form of a written statement, or, in other words, without producing a ^{*}balance-sheet; and [*361 if the production of a balance-sheet be absolutely necessary, in order to enable him to make the disclosure of his estate required by the first section, he is bound to produce it. It has been the invariable practice, for a series of years, to require an account in writing from the bankrupt, as appears by the appendix to Mr. Green's Treatise on the Bankrupt Laws, published in 1780, p. 432.

ABBOTT, C. J. I am of opinion that the rule for entering a nonsuit must be made absolute. The question is not whether a bankrupt is bound generally to deliver to the commissioners an account in writing of his estate and effects, but whether, under the circumstances of this case, it appears, on the whole matter before us, that the bankrupt has declined or refused to give answers to lawful questions propounded to him by the commissioners, with a view to the discovery and disclosure of his estate and effects. Upon the whole, I am of opinion, that he has declined to give satisfactory answers to such questions. It appears to me, from a careful review of all the provisions of the statute of the 5 Geo. 2, c. 30, that the legislature contemplated that the bankrupt should deliver to the commis-

(a) This case came on before the Lord Chancellor, in Michaelmas term, 1830.

sioners an account in writing of his estate and effects. The statutes before the time of James the First are silent as to any examination of the bankrupt; but by the 13th of Eliz. c. 7, s. 2, the persons acting under the lord chancellor's commission had an absolute power over the body as well as the estate of the bankrupt, and they could therefore exercise that power, to compel him to do all that they should think necessary to obtain knowledge of "his estate.

*362] By the statute of 1 James, c. 15, s. 7, it is made lawful for the commissioners to examine the offender (as he is called) upon interrogatories touching his lands, tenements, goods, chattels, debts, &c., as may tend to disclose his estate, secret grants, conveyances, &c.; and by the next section, they (if he refuses to answer) have authority to commit him, until he shall better conform him. Now if the matter had rested on that statute alone, it would be difficult to say that he was bound to give in a written account, for it imports only that he is to answer interrogatories. By the 5 Geo. 2, c. 30, s. 1, which was made for the further prevention of frauds committed by bankrupts, he is required to surrender himself, and submit to be examined, and on such his examination, fully and truly to disclose and discover all his effects and estate, real and personal, and how and in what manner, and to whom and upon what consideration, and at what time or times he has disposed of, assigned, or transferred any of his goods, wares, merchandises, moneys, or other estate and effects (and all books, papers, and writings relating thereto,) of which he was possessed, or in or to which he was any ways interested or entitled, or which any person had in trust for him, or for his use, at any time before or after the issuing of the said commission, or whereby such person or his family or families hath or have, or may have or expect any profit, benefit, or advantage whatsoever. If he makes a wilful concealment, to the amount of 20*l.*, then he is guilty of a capital offence. Now the words "disclose and discover" import a communication relative to his estate and effects to be made by him, without any particular inquiry on the part of

*363] those to whom he makes the disclosure; and in order *that the assignees may know that he does make a full and true disclosure, they are authorized, by the fourth section, to require him to attend them, to assist them in making out the accounts of his estate and effects. The object is, that the assignees may not be compelled to take blindly such account as he thinks fit to give them, but that he shall come to them to make it out in their presence, which may be a check on him. The fifth section is compulsory on the assignees, and in favour of the bankrupt. For by that it is enacted, that the bankrupt shall be at liberty to inspect his books, papers, and writings, and to bring with him two persons, at any one time, to make such extracts and copies from thence as he thinks fit; and this is to be done, the better to enable him to make a full and true discovery and disclosure of his estate and effects. He has therefore given to him the power of examining his own books, in order that he may be enabled to make out his accounts, so as to make a full and true discovery and disclosure of his estate and effects; and this rather imports that this disclosure should be in writing. The sixth section is more explicit on this subject, and provides, that in case the bankrupt is in execution, or cannot be brought before the commissioners, the commissioners shall from time to time attend the bankrupt and take his discovery; and the assignees shall have power and are required to appoint one or more persons to attend him in prison from time to time, and to produce to him his books, papers, and writings, in order to prepare his last discovery and examination, (which words, it is to be observed, are thus classed together,) "according to the directions before mentioned; a copy whereof (that

*is, of his last discovery and examination,) the assignees of the estate shall *364] apply for; and the bankrupt shall deliver the same to them or to their order, ten days at least before such last examination. Now it is impossible to understand this section in any other way than as saying, that the discovery of the bankrupt's estate should be in writing; for the bankrupt, if in prison, is entitled to be

attended by one or more persons, who are to produce to him his books, in order that he may prepare his last discovery, viz., the discovery of his estate, which must be in writing (because the assignees are entitled to have a copy of it,) and ready ten days before he comes up for his last examination, in order to give them an opportunity of considering it, and putting such questions as may be thought necessary, respecting those items which he may think fit to put in that account. The sixteenth section authorizes the commissioners to examine the bankrupt, as well by word of mouth as on interrogatories in writing, touching all matters relating to his trade, dealings, *estate, and effects*, and to take down, or reduce into writing, the answers of verbal examinations of every such bankrupt had or taken before them as aforesaid; which examination, so taken down, or reduced into writing, the party examined shall sign and subscribe. And in case any such bankrupt shall refuse to answer, or shall not fully answer, to the satisfaction of the commissioners, all lawful questions put to him by the said commissioners, as well by word of mouth as by interrogatories in writing, or shall refuse to sign and subscribe his examination, so taken or reduced into writing as aforesaid, (not having a reasonable objection either to the wording thereof, *or otherwise to be [*365 allowed by the commissioners,) they may commit him. That section contains the specific power of examination, together with the authority to commit if satisfactory answers are not made to such lawful questions as may be propounded to him. This I think is a summary view of all those provisions of the statute that relate to the subject now before the court. Taking the whole together, it seems to me clear that the legislature does contemplate that the bankrupt shall furnish to the commissioners some written disclosure or discovery of his estate and effects; and the uniform practice has been conformable to this construction of the statute. For it appears by Mr. Green's treatise on the Bankrupt Laws, that it has been usual for the bankrupt to give in, at his last examination, some written account of his estate and effects. That which is called the balance-sheet contains only the summary of his estate and effects, specifying what debts are due from him, what effects he then possesses, in addition to debts which are due to him, what he has expended, what his capital was, how that has been laid out so as to account for the reason of his becoming a bankrupt. All these matters are exceedingly important, with the view to the certificate which is afterwards to be granted to him. The question then is, whether this bankrupt has not declined to answer questions lawfully put to him respecting the account in writing, which he was bound to deliver. It appears in this case, that on the examination of the 14th November, the bankrupt was asked by the commissioners, "Where is your balance-sheet?" in other words: You have come to pass your last examination, are you prepared with an account in writing of your estate and effects? The answer is, "I have none prepared."—"Where [*366 is the statement of your property?" (which is the same thing as the balance-sheet.)—"Have you not got it?"—"No."—"Why not?"—A. "Having committed no act of bankruptcy, I think I am not bound to prepare it."—Q. "Do you wish this meeting to be adjourned for a fortnight, that you may prepare a statement of your accounts?"—A. "I beg leave to repeat my protest against the validity of this commission: I cannot be prepared within the term mentioned; but if the examination is adjourned for a sufficient period, I am ready to furnish the assignees with any information in my power respecting the estate and effects without prejudice, and will prepare my account." Now the allegation that he was not prepared, because he intended to dispute the commission, is no reason for not making a disclosure of his estate and effects. If there be good reason for disputing a commission, or for suspending a disclosure and discovery, until the validity of the commission shall have been tried, the authority of the great seal would, on proper application, be exercised for that purpose. The bankrupt, however, adopts the balance-sheet, as the best mode of giving the account required of his estate and effects; for he promises to pre-

pare it, if time be given. Then time is given to him. On the 5th December, a second examination takes place ; and he is asked if he has got a statement in writing ; but he says, he is not prepared to make a full disclosure, and prays time till the 5th of January next, within which time he binds himself to make up the accounts. Time is given till the 10th of August. At each meeting the inquiry is made, "Are you ready with that account in writing which you have originally said you would give us, and which by law you certainly ought to give us, unless you *have reasonable excuse?" He is not ready. Some [367] questions are put to him as to his estate. He is asked, "Do you know whether your debts or your credits are 10,000*l.* or 15,000*l.*?"—"I really can not tell, without the account in writing." When questions are put to draw from him answers as to his estate and effects, he answers, he cannot tell without the account in writing, which he had before promised to make out as the most convenient manner of making that disclosure which the law requires. From time to time, frivolous excuses are made ; and in the whole interval not one single step is taken by the bankrupt towards the accomplishment of that object, which he had originally said he would accomplish, which the legislature manifestly intended should be obtained from a bankrupt, and which the ordinary practice required. I view the whole, considering it only as one examination. I am clearly of opinion, that the bankrupt has refused and declined to give answers to those lawful questions that were propounded to him by the commissioners, in order to obtain a disclosure and discovery of his estate and effects. I think, therefore, that the defendants were justified in committing him, and that the rule for a nonsuit should be made absolute.

BAYLEY, J. The original impression on my mind in this case was, that the commissioners had exceeded their authority, in requiring a balance-sheet from the bankrupt, and that continued to be my opinion, until a very late period of the argument. But now that my attention has been fully called to the different clauses of the 5th Geo. 2, c. 80, I am satisfied that the commissioners, in this case, have required no more from the bankrupt than they were warranted in [368] doing, and that *the bankrupt has declined to answer questions lawfully put to him. The first clause of the 5th Geo. 2 directs, "that the bankrupt shall fully and truly disclose and discover all his estate and effects, real and personal;" and on his examination, he is to deliver up his books and writings. That clause is, however, perfectly silent as to the question whether there is to be a discovery or disclosure in writing made by the bankrupt. The 6th section provides for the case where the bankrupt has not access to his own books, and directs that those books shall be carried to him ; and that "in that case he shall prepare his last discovery and examination, according to the directions before mentioned." Now there are no directions before mentioned, except as to the discovery and disclosure expressly pointed out and provided for by the first section. The sixth section then proceeds, "a copy whereof," (that is, of that last discovery and examination, according to the direction before mentioned,) "the assignees of the estate shall apply for, and the bankrupt shall deliver to them, or their order, ten days at least before his last examination." If the bankrupt is therefore in custody, and if the books are carried to him, under the provisions of the sixth section, he is bound to make a discovery and disclosure of his estate, in order that he may be able to furnish a copy of that discovery, for his examination ; and for that purpose, it is quite clear that it must be in writing ; and that raises a very strong argument, that, under the first section, the disclosure and discovery which he is to supply to the commissioners, is also to be in writing. For the purposes of this case, it is not necessary to lay down, as a general rule, that the bankrupt shall in all cases be compelled to make such *disclosure and discovery in writing, because [369] here the bankrupt himself, from time to time, describes that mode of proceeding as necessary, for the purpose of making his disclosure and discovery.

He therefore accedes to the application for a disclosure and discovery in that way, as being the mode best adapted to the purpose. Supposing, however, that the commissioners have not strictly a right to insist upon a discovery in writing, and that the bankrupt might refuse to furnish it; then he must give such a disclosure and discovery as, under all the circumstances, he may be capable of giving; and if he gives it by word of mouth, it must, at all events, be as complete and full a disclosure as if it had been in writing. He is bound, under the first section, to prepare himself, at the time when the commissioners are to meet, to make a full disclosure; and if he cannot do that without writing, then it must be done in writing. It occurred to me at one period, that it might be a hardship on a bankrupt, to force him from time to time to be going through a very long and laborious investigation, when he might not have the means of supporting himself during the intermediate period of time. And if an extraordinary case of that description were to occur, I have no doubt but that the commissioners (if the assignees refused the bankrupt the means of subsistence) would think that a reasonable excuse for the disclosure not having been made at any of the periods appointed for that purpose, and would from time to time enlarge the period, until the assignees and creditors should consent to furnish the means of subsistence to the bankrupt in that intermediate time. That observation gets rid of a difficulty which once pressed on my mind. It seems to me, that it is the duty of the bankrupt, *before the period of time fixed [•370 for his last examination, to put himself in a situation to disclose every thing which the first section of the act requires; and that if it be essential that he should have written documents, in order fully to do so, he should get those written documents prepared. Since the passing of the statute, the uniform practice has been, at the last examination, for the commissioners to ask the bankrupt for a balance-sheet, or, in other words, for a discovery and disclosure in writing of his estate and effects. When the commissioners, at the first meeting, asked the bankrupt for his balance-sheet, if he had refused to give a written account, they might have called upon him then to make the same disclosure which a balance-sheet would exhibit. They might have asked him of what his estate consisted, how he had disposed of all the property which he possessed before the bankruptcy, and what debts were due to and from him; and they might then have reduced these answers into writing. Instead of that, however, the bankrupt agrees to prepare a balance-sheet; and in many of his answers, describes an account in writing as absolutely necessary to make a full and true disclosure of his estate; for he says he cannot tell how much his debts or credits are, till his accounts are made up. I think, therefore, that the non-production of a balance-sheet, after so many adjournments of the last examination, and after he had frequently promised to prepare one, was, in fact, declining to answer what his estate and effects were. If the bankrupt had refused to answer the questions, Of what do your estate and effects consist? how do you account for the amount of your debts? what is due to you? what is due from you? I should have had no doubt that he would have refused to answer questions lawfully put to *him, within the 16th section of the 5 Geo. 2, c. 30. I think his neglect to produce the balance-sheet is substantially the [•371 same as if he had refused to answer those questions. On that ground, therefore, I think that the commissioners were justified in committing him, and that judgment of nonsuit ought to be entered.

BEST, J. It is not necessary for us in this case, to decide whether commissioners have a right to require a balance-sheet, because it is clear from *Goddard's* case, that if the bankrupt chooses to submit to this as a mode of examination, when once he has so submitted, he must conform to it. Now I am quite clear, on looking at the evidence, that he did submit himself to this mode of examination; for he states, "If you will give me till such a time, I will prepare my balance-sheet." In consequence of his giving that answer, the com-

missioners might avoid putting certain questions which would have been put if he had not chosen to give an answer in writing instead of an answer by parol. I am of opinion, therefore, that whether the commissioners had authority or not, under this act of parliament, to require a balance-sheet, as this man has consented to furnish a balance-sheet, he was bound to do it; and that not having given a satisfactory reason for his neglecting to do so, the defendants were justified in committing him. Looking at all the provisions of the 5 Geo. 2, c. 30, and the constant practice which has prevailed from the time of passing that act to the present, I have no doubt that where it is fit, from the nature of the concerns of the bankrupt, that a balance-sheet should be produced, the commissioners may require it. The statute of James authorizes the commissioners to examine the bankrupt *upon interrogatories touching his lands, &c., and such other things as may tend to disclose his estate. That imports examination by question and answer. But the statute of the 5 Geo. 2, c. 30, s. 1, goes much further, and compels the bankrupt to submit to be examined, and upon such his examination fully and truly to disclose and discover all his estate and effects. By that section of the statute, therefore, the bankrupt is bound to make this discovery, whether any questions are put to him in that respect or not; and if that full and true disclosure cannot be made without writing, he is bound to furnish it in writing, and the commissioners are bound to require it. The uniform practice certainly has been to require such a balance-sheet of the bankrupt; and it appears to me that such practice is well warranted by the sound construction of this act of parliament; for by section 4th the bankrupt is to attend, in order to assist the assignee in making out the account of his estate. By the 5th section he is authorized to inspect his books, and to take two persons with him to make such extracts and copies as he shall think fit, the better to enable him to make a full and true discovery and disclosure of his estate and effects. Now the circumstance of his being authorized to make extracts and copies from his books, &c., rather imports that the disclosure afterwards to be made should be in writing. The 6th section, however, almost puts it beyond all doubt, that such extracts and copies taken from his books are allowed him for the express purpose of making a full and true disclosure of his estate and effects in writing; for it provides, that in case the bankrupt be in prison, the assignees shall appoint one or more persons to attend the bankrupt from time to time, and to produce to him his books, *papers and writings, in order to prepare his last discovery and examination, according to the directions before mentioned; a copy whereof the assignees shall apply for, and the bankrupt shall deliver to them ten days at least before his last examination. Now it is clear, therefore, that the discovery required by this section must be in writing, for if not, how could any copy of it be made? The first section, indeed, does not in express terms require the discovery then mentioned to be in writing. It seems to me, however, that under that section the commissioners may, in their discretion, require the bankrupt to make such discovery in writing or by parol, according to the circumstances of each particular case. Upon the whole, I am of opinion that the bankrupt's neglect to produce a balance-sheet is substantially a refusal to give answers to questions lawfully put to him by the commissioners relating to the discovery of his estate and effects, and that the defendants were therefore justified in committing him, and, consequently, that this rule for entering a nonsuit must be made absolute.

Rule absolute.(a)

(a) Holroyd, J., was absent.

fendant is not supported by proof that the goods were sold by the plaintiff and his deceased partner.

ASSUMPSIT for goods sold and delivered *by Jell* to the defendant. Plea, general issue. At the trial, before ABBOTT, C. J., at the last Summer assizes for the county of Kent, the proof was, that the goods were sold to the defendant by the plaintiff and his son, who were in partnership. The son had died before the commencement of this action. It was contended that this was a variance, inasmuch as the contract stated in the declaration was with the plaintiff alone; whereas that given in evidence was with the plaintiff and another. ABBOTT, C. J., reserved the point, and directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi for that purpose having been obtained in last Michaelmas term,

Marryat and *Chitty* now showed cause. This is no variance; for the material allegations in the declaration are proved. It is true that the defendant is indebted to the plaintiff alone for goods sold and delivered by him. They are not alleged to be the goods of the plaintiff, but merely that they were sold *by* him. *Slipper v. Stidstone*, 5 T. R. 493, is an authority to show, that a debt due to the defendant, as surviving partner, may be set off against a demand on him in his own right; and they referred to the note of Mr. Serjt. Williams to *Cabbell v. Vaughan*, 1 Saund. 291 g, *to show that the law upon this subject was at least considered by him as very doubtful. [*375]

ABBOTT, C. J. It is a well-established rule, that where two persons are joint-sellers of goods, they must both join in an action brought to recover the price. It was decided in *Richards v. Heather*, 1 B. & A. 29, that a party may maintain an action against a surviving partner without describing him as such; and the reason of that decision was this, that if the partners had been alive, and one only was sued, that circumstance could only be taken advantage of by plea in abatement, and was no defence upon the general issue. But if one of two joint-contractors sue, both being alive, that is a variance, and a good defence upon the general issue.(a) It seems, therefore, to be reasonable, that where a surviving joint-contractor sues, the fact of his being survivor should appear in the declaration. In a note to *Webber v. Tivill*, 2 Saund. 121, n. 1, Mr. Serjt. Williams lays it down, that it is necessary that all the persons with whom a contract has been made, if living, should join in the action, and if any of them are dead, that fact should be stated. From my own experience I can say, that that has been the general practice, and I think it ought not to have been departed from in this instance. The rule for a nonsuit must be made absolute.

Rule absolute.

Gurney and *Comyn* were to have argued in support of the rule.

(a) [1 Saund. 154 n, 291 f; 2 Mass. Rep. 510; 6 ib. 462, *Baker v. Jewell*; 2 Johns. Cas. 383, *Brant v. Gelston*; 16 Johns. Rep. 34, *Dob et al. v. Halsey*.]

*WYNNE Bart., v. TYRWHITT.

[376]

Entries in a steward's book above thirty years old, and coming from the proper custody, are admissible in evidence, without proving the handwriting of the steward. Semble, that the rule extends to all written documents coming from the proper custody.

This was an action of trespass, brought by the plaintiff as lord of the manor of Llanwest, for trespasses committed on the wastes of that manor, which he claimed as lord. The defendant set up title in Mrs. Eyton, who was the owner of four tenements in the manor. The plaintiff obtained a verdict. At the trial, before RICHARDSON, J., the books of the stewards of the manor were produced, from the year 1713 to 1787, and entries therein, of receipts of rent, read in evidence on the part of the plaintiff. They were produced by the then steward of Sir Watkin Williams Wynne. It was contended, on the part of the defendant, that in order to make the entries in the steward's book of the year

1787 admissible evidence, his handwriting should be proved. RICHARDSON, J., overruled the objection, on the ground that it appeared to come from the proper custody, and was more than thirty years old. A rule nisi for a new trial having been obtained in last Michaelmas term, on the objection taken at the trial, the court called upon

Jervis and Chitty to support the rule. They contended that the entries in the steward's books were not admissible evidence without proof of his handwriting, and the fact that he was dead. In the case of deeds, indeed, the circumstance of their being thirty years old dispenses with the necessity of proof of their execution, but that rule does not extend to other written documents.

*³⁷⁷ *Per Curiam.* The rule is not confined to deeds or wills, but extends to letters and other written documents coming from the proper custody. It is founded on the antiquity of the instrument, and the great difficulty, nay, impossibility of proving the handwriting of the party after such a lapse of time. (a) (b)

Rule discharged.

(a) See *Rex v. Ryton*, 5 T. R. 259; *Fry v. Wood*, Selw. N. P. 535; *Doe and Chapter of Ely v. Stewart*, 2 Atkyns, 44.

(b) [In the case of *Jackson v. Blansham*, 3 Johns. Rep. 292, Kent, C. J., says, "It is the accompanying possession alone which establishes the presumption of authenticity in an ancient deed." See also 9 Johns. Rep. 169, *Doe v. Phelps*; 10 ib. 475, *Doe v. Campbell*.]

ATKINS v. PALMER.

A commission for the examination of witnesses in a foreign country, directed the commissioners to examine the witnesses on interrogatories, and to reduce the examinations into writing in the English language, and send the same to England, and to swear an interpreter to interpret the depositions of such witnesses as did not understand the English language. It appeared by the return that the depositions, in the first instance, were reduced into writing in the foreign language, and translated by the interpreter into the English language within an interval of six weeks: Held, that the commission was well executed by the commissioners returning the depositions so translated into the English language.

THIS cause was tried before ABBOTT, C. J., at the London sittings after last Trinity term. The only question was, whether a commission issued out of the court of chancery to examine witnesses at Leghorn had been properly executed, so as to make the depositions admissible evidence on the part of the plaintiff. It appeared by the commission, that the commissioners were authorized to examine witnesses upon interrogatories, and to take such their examinations, and reduce them into writing in the English language on parchment, and then to send the same to England with a certificate in what manner the oath was administered to such witnesses who could not speak or understand the English language, and power was given to them to swear an interpreter, well and truly *³⁷⁸ to interpret the *oath and interrogatories which should be administered and exhibited by either party to such witnesses who did not understand the English language, out of the English into the language of such witnesses, and also to interpret their respective depositions taken to the said interrogatories, out of the language of such witnesses into the English language. The depositions were returned in the English language as well as the certificate, on oath, of the interpreter that he was acquainted with the idioms of the English and Italian languages, and that he had faithfully interpreted to the witnesses the interrogatories and cross interrogatories, and that he had made a true and faithful translation of their depositions from the Italian originals duly signed by the respective witnesses, which he had carefully and faithfully engrossed on the parchment containing the depositions, and that he had also truly and faithfully interpreted the oath administered to the witnesses. It appeared by the return that the depositions were taken on the 20th September, 1819, and the certificate of the interpreter, which was annexed to and returned as part of the return to

the commission, was dated the 7th November, 1819. It was objected at the trial that these depositions were not admissible in evidence, inasmuch as the commission did not appear to be well executed, for the original depositions were not reduced into writing in the English language, but a translation from them was made six weeks after they were taken. ABBOTT, C. J., held the evidence to be admissible, but gave the defendant leave to move to enter a nonsuit if the court should be of a different opinion, and a rule nisi for that purpose having been obtained in last Michaelmas term,

**Marryat* and *Adams* now showed cause. The commissioners were selected by the respective parties, and were present as their agents at [379] the time the depositions were reduced into writing, and at that time might have objected to the mode of proceeding. The parties therefore, by their agents having acquiesced in it, it is now too late to make the objection. The mode adopted in this case is in conformity with the general practice. The party at all events ought to have applied to the court of chancery to suppress the depositions.

The *Solicitor-General*, *Gurney* and *Campbell* contra. This commission was not well executed. The examination of the witnesses ought to have been interpreted at the time it was taken. Here the depositions were translated into the English language six weeks after they were taken. The commission directed that the examinations should be reduced into writing in the English language, whereas they were taken in the Italian. By the commission, it was directed that the interrogatories and depositions should be interpreted, which means that the oral statement should be rendered into the English language at the time it was taken. In this case it was rendered into the English language from a written paper six weeks afterwards, which is a mere translation.

ABBOTT, C. J. The question before the court is, whether it appears by the return to the commission, that the commissioners have duly executed it. They are persons appointed by the court of chancery in consequence of a [380] selection made by the litigant parties, and we are to presume that they have discharged their duty, if by reasonable interpretation we can do so. We are not to look out critically for objections, nor are we blindly to give credit to all they have done, but we are to see whether they have substantially discharged their duty. The commission in the first place directs them to take the examinations and reduce them into writing in the English language on parchment, and to send them to the court of chancery. Now that cannot be understood to mean that they are to send the identical paper or parchment on which they make their minutes, because the witnesses may occasionally make corrections in their testimony. The examinations would necessarily be first taken in a rough manner, and would afterwards be fairly copied out. The commission then makes a distinction between English and foreign witnesses, for as to the latter, the commissioners are directed to swear an interpreter, well and truly to interpret the oaths and interrogatories administered and exhibited by either party to the witnesses who do not understand the English language, out of the English language into the language of the witness, and to interpret their respective depositions out of the language in which they are made into the English language. It is not denied that the interpreter was so sworn, neither is it suggested that he has not fairly translated what the witnesses deposed, but the objection is, that it appears by the certificate of the interpreter, that the translation was made six weeks after the commission was taken, and that we are to collect from thence, that he did not translate the answers of the witnesses as the examinations went on; but that he took down the original depositions in the [381] Italian language, and afterwards translated them into the English language, and sent them here. Supposing however, that the commissioners understood the language in which the witnesses were examined, (which we must presume they did,) and that they were satisfied that what was said in

Italian was faithfully taken down, I do not see that any thing more was required of them than to leave it to the interpreter afterwards to render upon oath the depositions into English, which he appears to have done. I think therefore that the commission has been well executed, and consequently that this rule ought to be discharged.

BAYLEY, J. I am of the same opinion. The commission does not appear to me absolutely to require that the depositions of the witnesses should be translated at the time they are taken. The commissioners may require that to be done if they think fit ; but they are not bound so to do. It must be recollectcd here, too, that the commissioners are selected by the litigant parties, and by adopting the translation returned, the commissioner selected by the defendant says, that he is satisfied with that as the true translation of the depositions made by the witnesses.

BEST, J., concurred.

Rule discharged.

*382] *PULLING and Others, Assignees of LAVERS, a Bankrupt,
v. TUCKER.

A fraudulent conveyance, made voluntarily by a trader, in order to give a preference to particular persons to the prejudice of his general creditors, is an act of bankruptcy, although the bankrupt subsequently continued to carry on his trade for three years, at the end of which time a commission issued.

Action by the plaintiffs, assignees of Lavers, a bankrupt, for money had and received. At the trial before Wood, Baron, at the Devon Spring ssizes, 1820, the question was, whether, on the 18th of December, 1816, when the money sought to be recovered was paid to the defendant by the bankrupt, the latter had committed an act of bankruptcy ? The defendant was then the solicitor of the bankrupt. It appeared that from June, 1816, to January, 1817, the bankrupt was in insolvent circumstances. A deed, of the 13th December, 1816, prepared by the defendant, was produced on the part of the plaintiff, which recited that Thomas Lavers had agreed to advance the bankrupt 300*l.* William Lavers had agreed to lend him 700*l.*, and one Cranch 500*l.*, and the advance of these sums of money, and the receipt of them by the bankrupt was declared by the deed to have taken place at the time of the execution thereof, and a receipt for those sums was endorsed on the back, signed by the bankrupt and witnessed by the defendant's clerks. The deed then purported to convey the bankrupt's equity of redemption in several premises therein mentioned, in order thereby to secure the several sums so stated to have been advanced, and such further sums as then were or should thereafter become due to the parties, and the premises were charged with such demands accordingly ; and the deed contained several provisos and covenants for the purpose *of making such charge effectual.

*383] The bankrupt continued to carry on his trade until the 27th September, 1819, when the commission issued. This deed was found by the messenger to the commission among the bankrupt's papers. Cranch, one of the persons named in the deed, was called as a witness, and stated, that though he was a creditor for 500*l.*, the deed had been prepared without his knowledge, and that the first time he heard of it was at a meeting of the commissioners after the bankruptcy. The subscribing witness proved that he saw no money paid at the time when the deed was executed. The Lavers mentioned in the deed were brothers of the bankrupt. The learnd judge left it to the jury, whether the deed of the 18th of December, 1816, was not a fraudulent conveyance, voluntarily made by the bankrupt, in order to give a preference to particular persons, to the prejudice of his general creditors : if they thought it was, then the learned judge was of opinion that it was an act of bankruptcy, and would entitle the plaintiffs, as assignees, to recover. The jury found for the plaintiffs. A

rule nisi for a new trial having been obtained in last Easter term, the court now called upon

Moore, Adam, and Bayly, in support of the rule. In order to make a conveyance of part of a man's property an act of bankruptcy, it must have been made in contemplation of bankruptcy. *Jacob v. Shepherd*, 1 Burr. 478. Now in this case there is no evidence that the bankrupt contemplated bankruptcy at the time when he executed this deed. He continued in trade for three years afterwards, and the money stated in the deed to have been advanced by his brothers may have been for the "very purpose of enabling him to carry on trade, and so to avoid bankruptcy. If this be an act of bankrupt- [384] cy, every trader who mortgages his real estate commits an act of bankruptcy. Secondly, The deed here had never been delivered to the parties who were interested in it; they, therefore, could derive no benefit whatever from it. The bankrupt may have kept it in his possession for the purpose of raising money as his occasions might require. It may, therefore, be considered in the nature of an escrow. If this is held to be an act of bankruptcy, it will be in the power of every bankrupt in future, by executing a private deed, and keeping it in his custody, to produce it afterwards, and use it as an act of bankruptcy, having relation back to the time of execution.

ABBOTT, C. J. I am of opinion, on the authority of the case of *Morgan v. Horseman*, 3 Taunt. 241, that this question was properly left to the jury. In that case it was held, that a deed whereby a debtor, being pressed, conveyed estates in trust to sell and to pay the pressing creditor, with a further trust to pay his debts to certain relatives, in order to give them an undue preference in contemplation of bankruptcy, was an act of bankruptcy. It is true that in that case it was expressly stated, that the deed was executed in contemplation of bankruptcy; but *MANSFIELD, C. J.*, lays no stress on that circumstance, for he expressly says, that "a conveyance, either of all or part of a man's property, in favour of fewer than all his creditors, is an act of bankruptcy; because it is the means whereby the creditors may be defeated or delayed." "The question, therefore, in such a case, is, whether the deed be voluntarily made [385] by the bankrupt, in order to give a preference to particular creditors, to the prejudice of his general creditors. That was the very question submitted to the jury by the learned judge in the present case. Indeed, if it were material that the deed should have been executed in contemplation of bankruptcy, there is very strong evidence to show that it was so done in this case; for the bankrupt being in insolvent circumstances, conveys his real estate to certain persons as a security for debts then due, or any other debts which might accrue due. Such a deed, given under such circumstances, would make bankruptcy inevitable, and a man must be supposed to contemplate the consequence of his own acts. I think, therefore, if the case were to go down to a new trial, the jury would, upon this evidence, be compelled to find the same verdict.

BAYLEY, J., concurred.

BEST, J. By the first of James 1, c. 15, it is enacted, that every trader who shall make, or cause to be made, any fraudulent grant or conveyance of his lands, goods, or chattels, to the intent, or whereby his creditors *may be defeated or delayed* for the recovery of their just and true debts, shall be adjudged a bankrupt. The statute does not, therefore, require that the conveyance should be made in contemplation of bankruptcy; but it is sufficient if it be such whereby the creditors may be delayed. Now, in this case, the deed was executed in favour of two of the bankrupt's brothers, and of Cranch, who, though a creditor, did not know of the existence [386] of the deed until after the bankruptcy. As far, therefore, as he was concerned, it was a voluntary conveyance, giving him a preference over the other creditors. It was proved that no money was actually advanced at the time of the execution

of the deed. The bankrupt's brothers could, therefore, only be his creditors for a former debt ; and if so, the effect of this deed was to give them an undue preference. That was, however, a question for the jury ; and I think it was most properly submitted to them to consider whether the effect of the deed was to give a preference to particular persons, to the prejudice of the general creditors. If that was the effect of the deed, the creditors might thereby be delayed ; and it therefore constituted an act of bankruptcy within the meaning of the statute of James. It has been further objected, that inasmuch, as this deed remained in the possession of the bankrupt, it might be considered as an escrow. It appears, however, upon the evidence, that it was executed as a deed ; and, therefore, I am of opinion that it cannot be considered as an escrow.

Rule discharged.

Pell, Serjt., Gaselee, and Wilde, were to have argued against the rule.

Declaration stated that defendant bargained for and bought of plaintiffs a quantity of E. I. rice, according to the conditions of sale of the E. I. Company, to be put up at the next E. I. Company's sale by the proprietors, if required, at a certain price there mentioned. The proof was, that, besides these conditions, the rice was sold per sample. This is no variance ; the words "per sample" not being a description of the commodity sold, but a collateral engagement that it shall be of a particular quality.

The rice did not correspond with the sample ; but the defendant, after seeing fresh samples inferior in quality to the original purchase sample, put it up at the E. I. Company's sale, at a limited price ; and no bidding taking place to that extent, he bought it in : *Held*, that he could not afterwards repudiate the contract.

DECLARATION stated, that defendant bargained for and bought of the plaintiffs ; and the plaintiffs, at the request of the defendant, sold to the defendant a certain quantity, viz., 1826 bags of East India rice, at the rate of 18s. 6d. for each and every hundred pounds' weight thereof, according to the conditions of sale of the East India Company, prompt in three months, deposit 10l. per cent., to be put up at the next East India Company's sale by the proprietors, if required, and in consideration of the premises and that plaintiffs, at the request of the defendant, had undertaken and faithfully promised to deliver to the defendant the rice, upon the terms and conditions aforesaid, when they should be requested ; the defendant undertook to accept the rice of plaintiffs, and to pay them for the same. Breach, that the defendant, although requested, and although the time for the defendant to have accepted and paid for the rice, upon the terms and conditions aforesaid, had long since elapsed, had not accepted the same. Counts for goods sold and delivered, goods bargained and sold. Plea, non assumpit.

At the trial before ABBOTT, C. J., at the London sittings after last Michaelmas term, it appeared that the plaintiffs, merchants in London, had employed Dubuisson and Co., brokers, to sell a quantity of East India rice, and that they, in pursuance thereof, on the 15th of May, 1820, sold to the defendant a quantity of rice, under the following contract : "Bought, by order and ^{*388]} for account Mr. A. Palmer, of Messrs. Parker and Co., ex Hadlow, per sample, 1826 bags East India rice, at 18s. 6d. per cwt., company's conditions, prompt three months, deposit 10l. per cent., to be put up at the next East India sale by the proprietors, if required." On the 5th June 1820, the rice was put up for sale at the public sale of the East India company, by the defendant's orders ; but no bidding having been made to the extent of the limit put upon it by the defendant, it was bought in for him, in the name of the plaintiffs, for the purpose of avoiding the payment of an auction duty. Upon that sale, fresh samples were drawn and exhibited ; and these samples were inferior in quality to the sample exhibited to the defendant when he purchased. The defendant himself attended the sale, and had an opportunity of seeing the samples last

drawn. About a month after this sale, the defendant, for the first time, mentioned to Dubuisson that the rice purchased did not correspond with the purchase sample; and about ten days before the prompt, he gave the broker an order to redraw samples. These proved not equal to the original purchased samples, but corresponded with the samples exhibited by the East India Company previous to their sale. The prompt expired on the 15th August; and on the 14th of August, 1820, the defendant declined accepting the rice, on the ground that it did not correspond with the purchase sample. It was objected at the trial that there was a variance in the contract declared on, and that given in evidence; inasmuch as the latter was a contract for rice *per sample*, whereas the contract stated in the declaration was for rice generally. The lord chief justice overruled the objection, but gave the defendant leave to move to enter a nonsuit. It was *then contended, on the part of the defendant, that inasmuch as the [*389] plaintiffs had contracted to deliver to the defendant rice corresponding with the sample, the latter was entitled to repudiate the contract at any time, if the bulk did not in fact correspond with the sample. The lord chief justice was of opinion that he was bound to do so within a reasonable time, and he left it to the jury upon the evidence, to say whether the defendant had rejected the rice within a reasonable time. The verdict was found for the plaintiffs; and a rule nisi for entering a nonsuit or a new trial having been obtained, on the objections taken at the trial in last Hilary term,

Scarlett and *Campbell* now showed cause. The plaintiffs have proved the whole of the contract set out in the declaration. It is true, that the contract proved contains a collateral stipulation that the goods sold shall correspond with the sample: but it is laid down in *Clarke v. Gray*, 6 East, 564, that in declaring on a contract not under seal, consisting of several distinct parts and collateral provisions, it is sufficient to state so much of it as contains the entire consideration for the act, and the entire act or duty which is to be done (including the time, manner, and other circumstances of its performance) in virtue of such consideration, the breach of which act or duty is complained of. Here that rule has been sufficiently complied with, and consequently this is no variance. Upon the second point, it is a general rule, that if a party buy goods by sample, and they do not correspond with the sample, he is at liberty to reject them; but then he is bound to make his objection within a reasonable *time. In this, [*390] case, the defendant did not object to the quality of the goods until three months after the purchase. He saw the samples exhibited at the East India Company's sale, which were inferior to the purchase sample, consequently he was then aware that the bulk did not correspond with the sample; yet, notwithstanding he had a full knowledge of that fact, he takes to the goods as his own by putting them up for sale: he is therefore precluded from objecting to their quality.

The *Solicitor-General*, *Tindal*, and *Evans*, contrâ. The plaintiffs, by their contract having undertaken to deliver an article of a particular quality, are bound to declare upon that contract, and to set out in the declaration that part of the contract which is matter of description. It is, indeed, part of the consideration which induces the purchaser to agree to pay the stipulated price, and the whole of the consideration must be stated. *Tye v. Finmore*, 3 Campb. 462, is an authority to show, that where goods are sold by a contract which contains a description of their quality, it is a ground for nonsuit that they do not answer that quality. Secondly, the plaintiff cannot recover at all in the case of sale by sample, if the goods do not correspond with the sample; for that, in effect, is an express warranty that the goods shall be of a given quality. In *Iates v. Pym*, 6 Taunt. 446, GIBBS, C. J., lays it down, "if a purchaser does not object to the quality in a reasonable time, a strong use may be made of that circumstance; but the use is, that a conclusion arises that the injury has accrued since the sale; that, however, may be rebutted." That is an authority to show,

*391] that where *the thing is warranted to be of a particular quality, it is a good defence to an action brought for the price, that they were not of the quality. At all events, the defendant must be shown to have had a full knowledge of the difference of quality between the bulk and the sample, and to have accepted the goods with that knowledge. Now, here, the rice itself was at Woolwich; the defendant, after the East India Company's sale, went there, examined the rice, and within three weeks made the objection.

ABBOTT, C. J. I am clearly of opinion, that there ought not, in this case, to be a nonsuit on the ground of variance. The words per sample, introduced into this contract, may be considered to have the same effect as if the seller had, in express terms, warranted that the goods sold should answer the description of a small parcel exhibited at the time of the sale.(a) Now if there had been such an express warranty in this case, I should be of opinion that the plaintiff would not be bound to set it out in his declaration, for he is only bound to set out the contract for the breach of which he declares. The words per sample are not a description of the commodity sold, but a mere collateral engagement on the part of the seller, that it shall be of a particular quality; the breach of that engagement may furnish a matter of defence to the defendant, but the plaintiff does not rely on it, and need not state it in his declaration. Upon the other point, I stated to the jury, that although the declaration did not allege this to be a sale by sample, yet it was a good defence, that the goods sold did not correspond with the sample, unless the defendant, by his own conduct, had precluded himself from taking *that objection. The

*392] general rule undoubtedly is, in the case of a sale by sample, that the purchaser may reject the commodity, if it does not correspond with the sample; but every man may waive a rule of law which is in his own favour. Now I do not say that in every case a purchaser is bound to examine immediately, whether the goods correspond with the sample; but I am of opinion, that by suffering the rice, to be put up for sale, after he knew, by the fresh samples drawn from the bulk, that it did not correspond with the original purchase sample, and by fixing a price below which the rice was not to be sold, and thus taking his chance of that sale, the defendant did in fact consent and agree, that, as far as he was concerned, the goods should be considered as corresponding with the sample. If at that time he had determined not to take the rice, the plaintiffs, at least, should have had an opportunity of determining for themselves, whether they would or would not suffer the goods to go into the hands of another buyer at that sale, for a price inferior to that which the defendant had given. By taking the chance of making a profit at that sale, he deprived the plaintiffs of that opportunity. In justice and conscience, therefore, he ought to be estopped from objecting that the goods did not correspond with the sample. I think, therefore, that there is no ground either for a nonsuit or a new trial, and that this rule ought to be discharged.

HOLROYD, J.(b) I am of the same opinion. The objection of variance applies to those cases only where the declaration states one ground of action, and the party gives proof of another. In that case the plaintiffs must *be nonsuited, because the defendant comes prepared to defend himself only against the contract stated in the declaration. That is not the present case. Though the goods are sold by sample, still it is true that there was a sale of goods as described in the declaration, viz., such a quantity of such kind of goods; the contract, besides, states them to have been sold by sample. That is a collateral contract on the part of the seller, that the goods should correspond with the sample. If they do not answer the sample, the effect of that is, that the defendant may not be bound to accept them; or, if he does so, he may have a right of action for the damages he sustains by

(a) [13 Mass. Rep. 139, *Bradford v. Manly*; Yelv. 21 c, (Metcalf's ed.)]

(b) Bayley, J., was absent at chambers.

reason of their not corresponding with the sample. I am, therefore, of opinion that the objection as to the variance cannot prevail. Then, as to the next question, I am of opinion that the defendant, after what has happened, cannot now say that this contract is wholly void on the ground that the goods do not correspond with the sample. By the terms of the contract he has a right to require the rice to be put up for sale in the name of the original proprietors. The samples at the public sale were inferior to the original purchase sample. The defendant saw them; and he then had a right to annul the contract altogether. He, however, does not do that; but he treats the goods as if they actually corresponded with the sample. Now a purchaser may perhaps suffer less inconvenience by taking the goods, though inferior in quality to the sample, than by refusing them altogether; and if he takes them under those circumstances he will be entitled to such damage as he may sustain by their not answering the description in the contract. The defendant treats the goods, at the time of the second sale, as if they were his own *property, for he [*394] actually attempts to dispose of them as such. By assuming the dominion over the property, he treats the first sale to him as a valid sale, and he cannot afterwards insist that it is void. I think, therefore, that the plaintiff, though he could not be obliged to part with the rice, on account of his lien, till the deposit was paid, still may insist on the defendant's taking the rice and paying for it, subject to the right of the latter to bring an action for damages, on the ground that they did not correspond with the goods actually agreed for. I think, therefore, that there is no ground either for a nonsuit or a new trial, and that this rule ought to be discharged.

BEST, J. I entirely agree with the rest of the court on both points. It is unnecessary for me to add any thing to what has already been said by the court upon the objection of variance. With respect to the other point, I am clearly of opinion that the plaintiff is entitled to maintain this action, although it appear that the bulk does not correspond with the sample. In this case, if the rice had been transferred into the name of the purchaser, that would have amounted to a symbolical delivery. That has not been done in this case, merely because, if it had been so transferred to his name, and bought in at the sale, a duty would have been payable. If, however, the purchaser professes to act on the contract, although the goods be not actually transferred into his name; if he avails himself of the privilege of selling, though under the name of another owner, that must be considered as a sale by himself; and the taking upon himself the disposition of the goods is equivalent to an acceptance. It appears here, that [*395] before the goods were put up a second time to sale by the defendant, he knew that they did not exactly correspond with the sample. If, before the second sale, he had rejected the goods, he might have brought himself within the principle laid down in *Yates v. Pym*, 6 Taunt. 446, but he thinks proper to take the chance of gaining a profit by bringing them to a good market, intending, at the same time, if they did not sell to a profit, to attempt to return back the goods. I think, however, that by treating the goods as his own, he has placed himself in a situation in which he is in no condition to answer an action for goods sold. He may still bring an action for breach of the warranty; but it is too late for him to repudiate the contract. I think, therefore, that the question was properly left to the jury, whether it was not too late to return the goods, and that this rule should be discharged.

Rule discharged.

RUSSELL v. BANGLEY.

A policy delivered to an insurance broker for the purpose of settling a loss, is adjusted by the underwriter, payable at a month. The broker charges the underwriter in account for the loss, and transmits to the assured an account, in which he states himself to be debtor for the amount of the loss: and for the balance of that account the assured draws a bill upon

the broker, which the latter accepts, but does not pay. The underwriter's name never having been struck off the policy, it was held that he was not discharged.

ACTION on a policy of assurance subscribed by the defendant for 150*l.* At the trial, before GRAHAM, Baron, at the last Bristol assizes, the question was, whether, under the circumstances of the case, the plaintiff had not been paid. It appeared that the policy had been effected in October, 1819, by one Savery, *396] a broker, *who returned it to the assured. A loss having afterwards happened, the plaintiff delivered it to Savery, to get the loss adjusted. On the 15th March the loss was adjusted by the defendant, payable at one month. Savery, the broker, then made out and transmitted to the plaintiff his account current, in which he made him debtor for various premiums upon former policies, and credited him with 150*l.*, the amount of the loss upon the policy, and the balance due to the plaintiff on this account, was 133*l. 4s.* For that sum the plaintiff, on the 18th March, drew a bill at two months on Savery, which the latter accepted. Savery at the same time debited the defendant with the amount of this loss in his account. The policy remained in Savery's hands, but the name of the defendant was not cancelled. The bill drawn by the plaintiff became due on the 21st of May, but was not paid, and soon afterwards Savery became bankrupt. It was proved, that the usage in the insurance business was for the brokers to settle with the underwriters, according to the state of the accounts between them. If the account were against the underwriter, the latter paid the amount of the loss or the balance, (after deducting the premiums,) to the broker at the expiration of the month ; but if the account was in his favour, then no money passed to the broker, but the latter debited the underwriter with the loss, and settled the balance of the account at the end of the year. Between the assured and the broker, the balance is either paid, or carried to the credit of the assured, at the option of the latter. At the trial the learned judge inclined to think that the plaintiffs had, by accepting the credit of the broker, received payment of the loss in question ; and he nonsuited the plaintiff, with liberty to *397] the plaintiff to move *to enter a verdict. A rule nisi for that purpose having been obtained in last Michaelmas term,

Pell, Serjt., and Manning now showed cause. *Andrew v. Robinson*, 3 Campb. 199, is an authority to show, that as soon as the broker receives credit from the underwriter for the amount of the loss, the assured may maintain money had and received against the broker. In *Wilkinson v. Clay*, 6 Taunt. 110, the insurance-broker had debited the underwriter with a loss, and taken his acceptance for the balance of the account between them, payable at a later date than the loss would have been payable in cash ; and it was there held, that the assured might maintain money had and received against the broker, even though the acceptance was dishonoured, and the broker had never received any money. These authorities show that the broker may, under circumstances, become debtor to the assured for the loss. The present case is much stronger in favour of the underwriter, for the plaintiff here has assented to receive payment by the acceptance of the broker. When the loss happened, the broker transmitted to the plaintiff his account, and made himself debtor for the amount of the loss ; and the plaintiff, by acquiescing in that account, and drawing on the broker for the balance, agrees to accept him as his debtor instead of the underwriter. By the usage of the trade the broker, who is the common agent of both parties, does not receive money from the underwriter, but transfers to the assured the debt due from him to the underwriter ; and to that transfer so made conformably to the general usage, the assured, in this case, has assented.

*398] *Gaselee, contrâ, was stopped by the court.* **ABBOTT, C. J.** The general rule of law is, that if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal, but if the agent, instead of receiving money, writes off money due from him to the debtor, then the latter is not discharged.

In cases of insurance, usage may possibly introduce a different rule; but at all events an underwriter has never been considered discharged as against the assured, until his name has been struck off the policy. If the underwriter relies on his communication with the broker, as discharging him without actual payment of the money, he should insist that his name should be struck off the policy. If that be done, and the plaintiff then forbears to call upon him for payment within the period warranted by the usage of the trade, then the underwriter may be discharged, but otherwise he is not. The name not having been struck off in this case, I think that the plaintiff is entitled to recover.

BAYLEY, J. I am of opinion, that the verdict ought to be entered for the plaintiff. When Russell left the policy in the hands of Savery, he made him his agent, to receive the money from the underwriter. It then became the duty of the underwriter to pay Savery in money, so as to enable him to hand it over to the assured. In this case the defendant did not do so, but left it to the broker, to make the payment to the assured in such a way as he might think fit. In fact, he made the payment by a bill of exchange, which ultimately was not available, and therefore no money *came to the hands of the assured. [*399 Now, if the defendant makes the broker his agent, to pay the money over to the assured, he should inquire whether he has, in point of fact, made that payment. If the name had been taken off the policy with the consent of the assured, then, when the underwriter applied to the broker, he would have seen that, and he might then fairly suppose that there had been actual payment made by the broker to the assured. If the defendant had used due diligence, he might have learned whether there had been that which the assured had consented to receive as payment. Here, if he had desired to look at the policy, he would have seen that that raised no presumption whatever; and if he had then asked if there was a receipt, he would have found nothing of that kind. The plaintiff, therefore, never put in the power of Savery to hold out to the defendant that the money was in point of fact paid. The fact of his taking Savery's bill was nothing more than an agreement, to accept payment in that way if it should be ultimately available. If the defendant had meant that the money should be paid by bill, he should have sent that bill to the assured, or he should have pledged his own credit in some respect. Savery is in fact the agent of both parties; of the assured to receive the money, and of the underwriter to make the payment. He has not done his duty as agent for the underwriter, for he has not in fact paid the money. That being so, and the assured having done nothing to hold out to the underwriter that payment had been made, the principal, who has trusted an agent who has not performed his duty, is liable. I am, therefore, of opinion, that this rule should be made absolute.

*HOLROYD, J. I am of the same opinion. The delivery of the policy to the broker to settle the loss authorizes him to receive the money [*400 due to the assured on the policy. If he had received the money, and afterwards failed, the assured could not have called on the underwriter again, because he would then have paid the money to an agent duly authorized to receive it. But the delivery of the policy to the broker to obtain payment does not authorize him to settle the loss in any other way than by receiving the money. Now, in this case, the policy having been placed in the hands of the broker, an account is made out, showing how much was due from the assured to the broker on one hand, and from the broker to the assured on the other; and in that account the broker states the amount of the loss in question to be a sum due from him to the assured. It was, however, in fact, due from the underwriter. For the balance of that account the assured drew a bill on the broker, which was accepted by the latter, but not paid in due course, and that without any default of the assured in endeavouring to obtain payment. This being so, I cannot distinguish this case from those in which it has been decided, that receiving a bill from a third person is not a satisfaction of a debt, in case the bill be not

eventually paid, unless there be some default in the holder. I think, therefore, that there has not been any payment, and that the verdict should be entered for the plaintiff.

BEST, J. I am of the same opinion. The broker was only authorized to receive payment in money. In this case the defendant has settled the loss with [401] the broker, that is, the amount due to the plaintiff has been ascertained between them, and the broker accepted a bill for the same. Before, however, the giving of a bill of exchange by a third person can discharge an original debtor, it must be shown that the person taking that bill agreed to accept it in full satisfaction. There is no such agreement in this case. It appears clearly that it was not understood by the plaintiff that the original debtor was to be discharged; for it appears that that has not been done which is usually done when the underwriter is discharged, viz., his name has not been struck off the policy. If that had been done, it would have furnished strong evidence that it was struck off with the plaintiff's privity. The name still appearing in the policy, I think it must be taken that the plaintiff must have accepted this bill as an additional security, and not with an intention to discharge the underwriter. That being so, I think this rule should be made absolute.

Rule absolute.(a)

(a) [See 11 Johns. Rep. 409, *Whitbeck v. Van Ness*; 7 ib. 311 (2d. ed.) and notes.]

DOE, on the Demise of THOMAS BRYAN, v. CHRISTOPHER BANCKS.

A lease of coal-mines reserved a royalty rent for every ton of coals raised, and contained a proviso that the lease should be void, to all intents and purposes, if the tenant should cease working at any time two years. After the working had ceased more than two years, the lessor received rent: *Held*, that a tenancy from year to year was not thereby created; for the lease was not absolutely void by the cesser to work, but voidable only at the option of the lessor, and that he might avoid the lease upon any cesser to work commencing two years before the day of demise in the ejectment.

EJECTMENT to recover lands and mines in the parish of Broseley, in the county of Salop. The day of demise laid in the declaration was the 18th of April, 1820. At the trial before RICHARDSON, J., at the last Summer assizes for the county of Salop, it appeared in evidence, that on the 14th December, 1802, Thomas Bryan, by an indenture of lease demised to Thomas [402] "Coombe and others all the colliery, coal-work, iron, stone-work, rocks and quarries, in and under certain pieces of ground of T. Bryan in the parish of Broseley, except trees, &c., with liberty to make pits, &c. Habendum from the 1st of January next for ninety-nine years, rendering a royalty rent of 1s. 2d. for every ton of coals, and 3s. 6d. per acre for the land. The lease contained the following proviso: "Provided also, and it is mutually agreed between the parties hereto, that the aforesaid works should commence and begin within one year from the date thereof, and if the same should stop or cease working at any time two years, this lease shall be deemed void to all intents and purposes." In 1809 the lease was assigned to the defendant, and he worked the mines effectually till May, 1813, when he withdrew the machinery, and, in fact, abandoned them. In May, 1815, May, 1817, and April, 1819, he, for the purpose of preserving the lease, raised a few tons of coals of hardly any value. At Michaelmas, 1817, Bryan received rent, and gave a receipt in the following words: "Received, the 29th September, 1817, of Mr. Bancks, by the hands of Mr. Birch, the sum of 4l. 3s. for half a year's rent of land and pits, due this day, by me." In March, 1818, Bryan took possession of the mines; but Bancks brought an ejectment, and in Trinity term, 1819, obtained judgment by default, and a writ of possession was executed in Bancks's favour. It was objected, on the part of the defendant, that there was no forfeiture of the lease, as the works had never ceased for two years. Secondly 'hat the for

feiture had been waived by the receipt of rent on the 29th of September, 1817; and, thirdly, that, at any rate, by the receipt of rent since the forfeiture, a tenancy from year to year had been created, which could only be determined *by [403] a notice to quit. The jury expressly found, that since 1813 the workings had been temporary, collusive, and fraudulent. RICHARDSON, J., thereupon directed a verdict to be entered for the lessor of the plaintiff, reserving to the defendant leave to move to enter a nonsuit on the objections made at the trial. A rule nisi for this purpose having been obtained in last Michaelmas term,

Campbell now showed cause. The working of the mines to preserve the lease must be bona fide, the rent depending upon the coals raised. [The court intimated a clear opinion in favour of the lessor of the plaintiff on this point, and desired *Campbell* to proceed to the others.] Secondly, the proviso in this case is, that the lease shall be void to all intents and purposes. It cannot, therefore, be confirmed as against the landlord by the receipt of rent. In Co. Litt. 215 a, it is laid down "that where the estate or lease is ipso facto void by the condition or limitation, no acceptance of the rent after can make it to have a continuance: otherwise it is of an estate or lease voidable by entry." 1 Inst. 215 a, and see 3 Rep. 65 a. And the reason for the distinction is, that the acceptance of rent cannot make a new lease when the old one is determined; but the acceptance of the rent is a sufficient declaration that it is the lessor's will to continue the lease; for he is not entitled to the rent but by the lease. *Finch v. Throckmorton*, Cro. Eliz. 221, and *Mulcarry v. Eyres and Others*, Cro. Car. 511, are also authorities in point. Thirdly, no tenancy from year to year was created, for the rent received at Michaelmas, *1817, may well be [404] considered as received under the lease. The landlord may be admitted to say, that although the lease subsisted to that time, it was forfeited before March, 1818, when he took possession. He may date the commencement of the two years at any time, so as to make the completion of it at any period in the interval between the receipt of the rent and the act of taking possession. This is a continuing forfeiture; and the landlord may take advantage of it at any time while it does continue.

Jervis, contra. The working of the coal-pits first ceased in March, 1813. In March, 1815, a forfeiture was complete. The lease then became void to all intents and purposes. It was void, therefore, both as to landlord and tenant. The receipt of rent subsequently to that period created a tenancy from year to year, which ought to have been determined by a notice to quit. On the other hand, if the lease was only voidable at the option of the lessor, the receipt of rent would confirm it to that period. If this be not the true construction of the lease, the consequence may be, that the landlord, by not insisting on a forfeiture in the first instance, may induce the tenant to make expensive improvements, and afterwards deprive him of the benefit arising from them.

Abbott, C. J. The question in this case is, whether the lessor of the plaintiff, in the month of March, 1818, when he actually entered and took possession of the farm, had a right to do so. As the judgment obtained against the lessor of the plaintiff, in 1819, is no bar to the plaintiff recovering in this action, so neither will our judgment in favour of the lessor of the plaintiff be conclusive *against the defendant, but he may in his turn bring another ejectment. [405] I am clearly of opinion, that in March, 1818, the lessor of the plaintiff had a right to recover. If the defendant, the tenant of the mine, had first ceased to work on Michaelmas-day, 1815, the landlord would have had a right to receive the rent that became due on Michaelmas-day, 1817, because the cesser for two years is requisite, in order to make the lease void, and he would also have a right to enter on the day after Michaelmas-day, 1817; and if he had a right to enter, provided the cesser had been for two years only, terminating at Michaelmas-day, 1817, which is the day of the receipt of the rent, it remains to be considered, whether, if the tenant had ceased to work for six years, the lessor

of the plaintiff would have had a right which he would have had on a cesser of two years. Unless the defendant can establish, first, that this lease became absolutely null and void, at the end of the first two years against both parties, so that no action whatever could be brought upon it, and unless he can also establish that the receipt of rent had the effect of creating a new tenancy from year to year, requiring notice to quit, the plaintiff is clearly entitled to recover. I am of opinion, that, notwithstanding the language of this lease, it did not become absolutely void by a cesser of two years, unless the landlord thought fit to make it so. If, indeed, it were held, that a lease thus became absolutely null and void, even where it was made to appear that there had been a continuance of the receipt of rent afterwards, the consequence might be, that when the landlord at an advanced period brought his action of covenant, he might be told that he had no right to maintain that action, on the ground that the lease had *406] *become void by forfeiture many years before. My opinion is, that the lease did not become absolutely void at the end of the first two years, unless the landlord chose to make it so. He, however, forbears to do so, and continues receiving the rent, and giving the tenant an opportunity of setting to work at the mines, which he neglects to do. I am of opinion, that the landlord had a right, as soon as he had received the rent up to Michaelmas-day, 1817, to enter and avail himself of the forfeiture incurred during the last two years. I think he might have done so on the very next day: at any rate, he has a right, now that there has been a continued cesser for two years previous to the ejectment brought, to enter upon it. There is no distinction between the very day after the receipt of the rent and the period of a week or month. I am of opinion, that the legal effect of this instrument is, that it is voidable only at the election of the landlord, and that he is at liberty to make the lease void at the end of any two years, during which two years there had been a continued cesser to work. In the present case, the defendant had ceased to work for the period of two years previous to the commencement of the action. I think, therefore, that the plaintiff is entitled to recover. This rule, therefore, must be discharged.

BAYLEY, J. I am of opinion, that the true construction of the proviso in this lease, "that it shall be null and void to all intents and purposes upon a cesser of two years," is, that it shall be voidable only at the option of the lessor, and that it does not lie in the mouth of the lessee, who has been guilty of a wrongful act, in omitting to work in pursuance of his covenant, *to avail himself *407] of that wrongful act, and to insist, that thereby the lease has become void to all intents and purposes. By the express provisions of the 18 Eliz. c. 10, certain ecclesiastical leases are made void, to all intents, constructions, and purposes; yet it has been frequently held, that such leases are good, during the life of the person by whom they are made. I think, therefore, that the fair construction of this lease is, that it is void only at the option of the lessor, and that the receipt of the rent on the 29th September, 1817, has not destroyed his right to bring this ejectment. I consider the demise as being, in substance, made in March, 1818, when he entered on the premises. Now if he had then brought an ejectment, he might have called a witness to prove, that from March, 1816, down to March, 1818, he had been constantly watching the pit, and that no work had been going on. That witness may not have known the pit before; and it surely would be no answer to say, that the defendant had been guilty of a previous cesser, or, in other words, that he had not worked the mine from the 1st of March, 1813. The effect of the receipt of rent on the 29th September, 1817, cannot amount to more than an acknowledgment on the part of the lessor of the plaintiff, that no forfeiture was then complete. He does not thereby admit that a forfeiture may not have been inchoate, but merely that it was not complete, so as to entitle him to bring an ejectment. I think that the landlord has it in his election to make this lease void or not; that he is not bound to exercise that election in the first instance; and that though he may waive it

from time to time, he is at liberty afterwards to insist on the forfeiture in respect of *subsequent misconduct. The case of *Doe on the Demise of Bos-cawen v. Bliss*, 4 Taunt, 735, is very much in point. There it was [*408] expressly held, that a lessor who has a right of re-entry reserved, on a breach of a covenant not to underlet, does not, by waiving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting. And *GIBBS*, J., is there reported to have said, "It might as well be contended, that if a landlord once knew that his premises were out of repair, and did not sue instantly, he could never after re-enter for a breach of covenant committed by their not being repaired." I am of opinion, that the receipt of the rent, in September, 1817, did not destroy the right of the lessor of the plaintiff to take any part of the period between September, 1815, and September, 1817, as a period in which a forfeiture was inchoate and beginning; and that if the cause of forfeiture continued, he is at liberty to add to that the subsequent period, from September till the March following, so as to complete the period of two years. For these reasons, it seems to me that the verdict was right.

HOLROYD, J. I am of opinion, that the tenant cannot insist that the lease is void against the will of his landlord, and also, that the acceptance of the rent will not create a tenancy from year to year. The tenant cannot insist that his own act amounted to a forfeiture; if he could, the consequence would be, that in every instance of an action of covenant for rent brought on a lease containing a proviso, that it should be void on the non-performance of the covenants, the landlord would *be defeated by a tenant showing his own default at a [*409] prior period, which made the lease void. If that be so, there is nothing to prevent the landlord claiming for the forfeiture of this lease, for a ceasing to work subsequent to the 29th September, 1815. That ceasing to work for two years after the 29th of September, 1815, would not make a forfeiture until after the expiration of the day of the 29th September, 1817. Now that is not inconsistent with the receipt of the rent on that day, for supposing it to be a receipt of rent under the lease, still the landlord may consistently say that the lease was forfeited on the 30th September, or the 1st of October, 1817, for two years cesser of work prior to either of those days. Although the landlord, by the receipt of the rent on the 29th September, 1817, may have admitted that the lease was existing on that day, yet he may avoid it on a forfeiture which became complete at a subsequent period.

BEST, J. In construing this clause of the lease, we must look to the object which the parties had in view. The rent was to depend upon the number of tons of coals raised. In order to derive any benefit from the mine, it was the object of the landlord, by introducing this clause, to compel his tenant to work it. The clause therefore was introduced solely for the benefit of the landlord, to enable him in case of a cesser to work, to take possession of the mines, and either work them himself, or let them to some other tenant. That therefore being the object of the parties in introducing this clause, I think it will be fully answered, by holding the lease to be void at the option of the landlord. Besides, I take it to be an universal principle of law and justice, that no man can take advantage of his own wrong. *Now it would be most inconsistent with that principle, to permit the defendant to protect himself against the [*410] consequences of this action, by afterwards setting up his own wrongful act at a former period. It appears to me that this was a continued forfeiture, and that the landlord had a right to take advantage of it, whenever he thought proper so to do. If the tenant be induced by the landlord's not taking advantage of the forfeiture in the first instance to make improvements, a court of equity would perhaps grant him relief. Upon the whole, I am of opinion that the rule for a new trial should be discharged.

Rule discharged.

WARD and Another, Assignees of GREAVES, a Bankrupt, v. WILKINSON and Another.

In trover by A. against B., C. is a competent witness to prove property in himself.

TROVER for oil of peppermint. At the trial before ABBOTT, C. J., at the London sittings after last Michaelmas term, the plaintiff's case was, that the bankrupt had purchased the oil of peppermint of one Beale, and obtained from him a delivery order on the evening of the 9th of August, (the act of bankruptcy having been committed on the 10th,) and that the oil had been seized by the sheriff under a fraudulent execution against the bankrupt at the suit of one Perryman, who had subsequently delivered it to the defendants, in payment of a debt he owed them. The defence was, that the bankrupt had fraudulently obtained possession of the oil from Beale, at a time when he was not in a situation to perform his contract, and, consequently, that under these *circumstances no property had passed to him or his assignees. Beale was called as a witness to prove that the delivery order was only given by him to enable the bankrupt to take the oil home and inspect it in bulk, and that it was expressly stipulated, that the bankrupt should not sell the oil until Beale was paid by a good bill. The lord chief justice rejected this evidence, on the ground that Beale was not a competent witness to prove title in himself. A rule nisi for a new trial having been obtained in last Hilary term,

Marryat now showed cause. This evidence was properly rejected, inasmuch as Beale had an interest in proving the property in himself. If the assignees succeed in this action, Beale could not recover against them; if, however, the assignees were defeated in this action, Beale would then be entitled to recover against the defendant.

Scarlett and Wilde contrà. In *Rex v. The Warden of the Fleet*, Rep. temp.

Holt, 134, it was held on a trial at bar, that no verdict can be given in evidence but such whereof the benefit may be mutual, that is, such as might have been given in evidence either by the plaintiff or the defendant, and Chief Baron GILBERT, Gilbert's Evidence, p. 28, lays it down, that nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary. Now here if Beale brought an action against Wilkinson, this verdict could not be given in evidence for him, because it is not between the same parties: and for the same reason, if an action were brought by Beale against *the assignees, this verdict, if in their favour, would not be evidence for them against Beale.

ABBOTT, C. J. I am of opinion, upon further consideration, that I ought to have received this evidence. The true question in these cases is, whether the verdict would be evidence in favour of the witness in an action brought by him to recover the same property. Now the verdict, if in favour of the present defendant, never could be evidence for Beale, unless it would be evidence against him, in the event of its being in favour of the present plaintiffs. If the verdict were in favour of the plaintiffs, and Beale were to bring an action against them for the goods, they could not give in evidence against Beale the verdict obtained in the present action, because Beale was not a party to that suit; and if it could not be given in evidence against Beale, neither can it be given in evidence for him. In fact, the proving of the title in himself, in this case, does him no good, and consequently he stands indifferent as to the legal result. I think, therefore, that the testimony ought to have been received, and that this rule must be made absolute.

HOLROYD, J. The rule is now perfectly established, that a person is a competent witness unless he be interested in the event of the suit. Beale in this case is not interested in the event of the suit, for the verdict in this action would not be evidence in an action brought by him. The case of *Nix v. Cutting*, 4 Taunt. 18, is an authority in point. It was an action of trover for a horse, and

*the question was, whether one Denny, who gave evidence on the part of the defendant, was an admissible witness. He stated, that it was agreed between the plaintiff and himself that he should take the horse as a security for the payment of 15*l.* deposited by him with the plaintiff, and that the horse should be sold at the next Woodbridge fair, if the money was not paid by that time. The money was not paid by that time, and the witness sold the horse at Woodbridge fair to the defendant. A rule nisi having been obtained for a new trial, on the ground that this evidence ought not to have been received, the court of common pleas confirmed the opinion of GROSE, J., at nisi prius, that the evidence was admissible, on the ground that the verdict would not be evidence in favour of the witness in any case. It seems to me that that case is expressly in point, and ought to govern the present. I think, therefore, this rule ought to be made absolute.

BEST, J., concurred.

Rule absolute.

TREACHER v. HINTON.

In an action against the acceptor of a bill payable at a banker's, it is not necessary to prove notice of non-payment to the acceptor. The court may order a verdict to be entered for the plaintiff, where the cause was undefended at nisi prius, and the judge directed a nonsuit, with liberty to the plaintiff to move to enter a verdict. [See ante page 212.]

DECLARATION by the endorsee, against the acceptor of a bill of exchange, addressed to the defendant, at Plymouth, and accepted, payable at Sir John Lubbock's and Co., bankers, London. The declaration contained an averment of presentation at Sir John Lubbock's and Co., refusal of payment, and notice to the defendant. At the trial before ABBOTT, C. J., at the London sittings after last Michaelmas term, the *plaintiff proved the handwriting of the defendant, the presentation at Sir John Lubbock's and Co., and the refusal to pay. ABBOTT, C. J., inclined to think, that since the late decision of the house of lords, in *Rowe v. Young*, the plaintiff was bound to prove that he had given notice of non-payment to the defendant; and the cause being undefended, he nonsuited the plaintiff, with liberty for him to move to enter a verdict for the sum mentioned in the bill. A rule nisi for that purpose having been obtained in last Hilary term,

Wilde now showed cause. The effect of a special acceptance is to impose on the holder of the bill the duty of giving notice to the acceptor, in case the bill be dishonoured at the place specified, and that results from the late decision of the house of lords in *Rowe v. Young*, 2 Brod. & Bing. 165. The acceptance is nothing more than an order to the banker to pay the money, and an undertaking that the acceptor had an authority to address the bill to him. In its operation and effect it is like a draft on a banker. It is so treated by all the parties concerned. It is clearly an authority to pay; and in practice the banker does pay, and it has been considered in the nature of a draft on a banker by courts of law. *Parker v. Gordon*, 7 East, 385, and *Elford v. Teed*, 1 M. & S. 28, are authorities to show, that a bill accepted, payable at a banker's, must, like a check, be presented within the usual banking hours. Now, in order to charge the drawer of a check, it is necessary to give him notice of non-payment by the bankers; and there is no reason why the same rule should not apply to the case of a bill payable at a banker's. At all events, the court, in this case, have no power to order a verdict to be entered for the plaintiff. *It is the province of the jury to pronounce the verdict, which they have not done in the present case; and the defendant not having consented that the nonsuit should be set aside, and a verdict entered, the court cannot now order that to be done.

Abraham, contrà, was stopped by the court.

ABBOTT, C. J. I am of opinion that this rule ought to be made absolute. Bills of exchange, of late years, have been made payable by the acceptor, either at the houses of his friends or agents, they being expressly named in the acceptance, or at banking-houses, or at houses merely described by their number in a certain street. It is most convenient, that the same rule should be laid down, as applicable to all these cases. The most plain and simple rule to lay down is this, that the effect of any acceptance in any of these forms is a substitution of the house, banker, or other person therein mentioned, for the house or residence of the acceptor, and, consequently, that the presentment at the house, or to the person named in the acceptance, is equivalent to presentment at the house of the acceptor. This rule, I think, will be equally applicable to the case of every acceptance, and will be convenient and advantageous to the public. On the other point, I have no doubt that the court have the power, in this case, to order the verdict to be entered for the plaintiff. I have frequently adopted this practice, in undefended causes, and I know of no other certain mode of giving the defendant, in an undefended cause, the benefit of a legal objection.

BAYLEY, J. I have no doubt, that, under the circumstances of this case, the *416] court may order a verdict to "be entered for the plaintiff. It appears from the evidence, that it was imperative on the jury to find a verdict for the plaintiff. When the judge, therefore, nonsuited, and stated, in the hearing of the jury, that the plaintiff should be at liberty to move to enter a verdict, and no objection was made, either by the defendant or the jury, the jury in fact consented that the verdict should be so entered, if the court thought fit. It seems to me, therefore, that when it is entered, it becomes the verdict of the jury, as much as if it had been originally pronounced by them. It would be inconvenient, in point of practice, and most injurious to defendants, if the rule were otherwise; for then it would be the bounden duty of the judge to direct a verdict to be given for the plaintiff, even where he entertained a doubt as to the plaintiff's right, in point of law, to recover; and, possibly, the defendant (not being present) might never be aware of the legal objection; whereas by the practice of nonsuiting, the defendant must have notice, because the plaintiff is bound to serve him with the rule nisi for entering a verdict, and he then has an opportunity of showing cause against that rule. On the other point I have no doubt. An acceptance payable at a banker's is substantially a statement by the acceptor, that that is the place at which payment will be made by himself, his banker, or his agent; and it is the duty of the acceptor to take care that such payment is duly made. He has an opportunity, from time to time, of calling on the bankers for his account, and he may give them directions to send all bills to him as soon as they are paid, and then, by looking at such accounts, he will know whether such payments have been made or not; I think, therefore, that this rule should be made absolute.

*417] **HOLROYD, J.** I am clearly of opinion that this is not a check; it could not be declared upon as a check, but only as a bill of exchange accepted by the defendant. I think that the effect of this special acceptance is an engagement on the part of the acceptor to pay at the place mentioned in the bill, either by himself or his agent. That was the ground of the decision of the house of lords, in the late case of *Rose v. Young*, where it was held, that the holder is bound to make the presentment at the place mentioned in the acceptance. With respect to the other point, I am clearly of opinion, that, under the circumstances of this case, the court is well warranted in ordering a verdict to be entered for the plaintiff. All the necessary proof was given to entitle the plaintiff to recover, and it was imperative on the jury to find a verdict for him. The lord chief justice having a doubt on a point of law, stated, in the hearing of the jury, that there should be a nonsuit, with liberty to the plaintiff to move to enter a verdict in his favour, in case the court should be of opinion that the

doubt which he entertained was unfounded. The jury assent to that, and that being so, the case may be considered as if the jury had actually pronounced their verdict in favour of the plaintiff, and the judge had then interposed and said that he had a doubt on a point of law, and that the plaintiff should be nonsuited; and if that nonsuit should be set aside, the verdict should stand. I think, therefore, that the verdict ultimately entered for the plaintiff is to be considered as the act of the jury, and not that of the judge.

BEST, J., concurred.

*ALLEN, Assignee of JOHNSON, a Bankrupt, v. CANNON [^{*418}
and Others.]

A person living in the Isle of Man, coming from time to time to England, and buying goods which are afterwards sold in the Isle of Man, is a trader against whom a commission of bankrupt may issue in England, although he in fact never sold any goods in England.

TROVER by the plaintiff, as assignee of Johnson, a bankrupt. At the trial before PARK, J., at the last Summer assizes for the county of Lancaster, it appeared that the bankrupt had for several years carried on the business of a linendraper in the Isle of Man, and had from time to time come over to England and purchased goods, which he afterwards sold, in the course of his trade, in the Isle of Man; but he had never sold any goods in England. It was objected, that in order to make him a trading person within the meaning of the bankrupt laws, there ought to have been both a buying and selling in England. The learned judge overruled this objection, and a verdict was found for the plaintiff. A rule nisi for a new trial having been obtained in last Michaelmas term, upon the objection taken at the trial, the court now called upon

Hullock, Serjt., and Littledale, to support the rule. The bankrupt was not a trader within the meaning of the statute 1 Jac. 1, c. 15, for he only bought goods in England; whereas, to make him a trader subject to the bankrupt laws, he ought to have bought and sold in England. They cited *Williams v. Nunn*, 1 Taunt. 270.

ABBOTT, C. J. I am of opinion that a person living in the Isle of Man, coming from time to time to England, and purchasing goods to be sent to the Isle of Man, and which are there sold, is a person using the trade of merchandise within the meaning of the statute of 18 Eliz. c. 7, and 1 Jac. 1, c. 15. In *Ex parte Smith*, Cowper, 402, the bankrupt was never resident in England, nor had ever traded in England, and he had come over on purpose to get the commission taken out against him; yet Lord HARDWICK held him to be a trader subject to the bankrupt laws. In *Bird v. Sedgwick*, Salk. 110, and *Alexander v. Vaughan*, Cowper, 398, it was held that a person trading to England, though not a resident trader in England, is an object of the bankrupt laws, if he commits an act of bankruptcy here. Upon the authority of those cases, and upon the words of the statute, I have no doubt that the bankrupt was a trader; and I, therefore, think that this rule should be discharged.

Rule discharged.

See *Doddesworth v. Anderson*, T. Raym. 375. [T. Jon. 141, S. C.]

CHARLES INNELL and ELIZABETH, his Wife, v. NEWMAN and Another.

Husband and wife lived separate under a deed, by which he stipulated that his wife should enjoy, as her separate and distinct property, all effects, &c., which she might acquire, or which by any gift, grant, &c., or representation, she, or he in her right, might be entitled to; and that he would not do any act to impede the operation of that deed, but would ratify all lawful or equitable proceedings to be brought in his or their names, for recovering such real and personal estates; and the wife having, as executrix of R. M., commenced an action on a promissory note against defendants in the names of her husband and herself, the

husband released the debt, which release was pleaded *puis darrain continuance*. The court, on application, ordered such plea to be taken off the record, and the release to be given up to be cancelled.

JERVIS, in last Michaelmas term, had obtained a rule calling upon the defendants to show cause why the plea *puis darrain continuance*, put in by them at *420] the trial of this cause, should not be taken off the record, and the release therein mentioned be delivered up to be cancelled. It appeared upon the affidavits that the action had been commenced by Elizabeth Innell, the wife of the plaintiff, as executrix of Richard Moss, to recover a sum of money due upon a promissory note; and that the cause being at issue, the defendants, at the last assizes for the county of Oxford, on the 13th of July, pleaded, *puis darrain continuance*, a release executed on the 3d day of July by Charles Innell, the plaintiff. The affidavits then stated that the action was commenced and prosecuted for the sole benefit of Elizabeth Innell, and that on December 7th, 1798, a regular deed of separation was entered into between Charles Innell and his wife, whereby he agreed to allow her to enjoy, as her distinct and separate estate and property, all such effects whatsoever which she might thereafter purchase or acquire, or which by any gift, grant, limitation, devise, bequest, descent, or representation, she or the said Charles Innell, his heirs, executors, or administrators, in her right, should or might be entitled to; and that these should be enjoyed, without any interruption by the said Charles Innell; and that he would not, at any time, do any act to impede the operation of that deed, but would, at all times, allow of, ratify, and confirm all lawful and equitable proceedings to be brought or prosecuted in his or their name or names, with or without the said Elizabeth his wife, for recovering and obtaining such real and personal estates. The affidavits further stated, that from the execution of the deed the parties had constantly lived separate; and that the release was, as they verily believed, collusively obtained.

*421] *W. E. Taunton* and *G. R. Cross* showed cause, and contended that the deed of separation in this cause was wholly illegal; and that the husband might any time resume his marital rights, notwithstanding its provisions; and, besides, even if that were not so, the court would hardly enforce the provisions of such a deed by a summary proceeding. Here, too, the husband may be liable for the debts of the testator, in case of a *devastavit*; and it therefore could never be in the contemplation of the parties, that the wife should receive the money due to the testator. In Jenkins Rep. 79, it is laid down, that the husband, by his grant, may dispose of the goods and chattels which his wife has in her own right, or as executrix. The object of this deed of separation was only to secure to the wife all the property which she might have, or of which she might be entitled to the beneficial enjoyment; but it was never intended to include property which she had solely in her representative capacity.

Jervis and *Campbell*, contrà, were stopped by the court.

ABBOTT, C. J. Whilst the husband continues to relinquish his marital rights, it would be contrary both to equity and justice, if we were to allow him, in direct violation of the contract which he has made, to execute a release of this sort, and thereby to render the suit commenced by his wife in her character of executrix utterly unavailing. It is not necessary for us to decide as to the right of the husband to receive the money, when recovered by the present action. *422] All that we do, on the present occasion, is to say that he shall not be allowed in this manner to prevent the suit from proceeding. I am therefore of opinion that this rule ought to be made absolute.

BAYLEY, J. I am of the same opinion. The wife in this case is bound, as executrix, to act for the general benefit of all persons interested under the will of the testator; and the husband ought not to be permitted to prevent this by a wrongful act, which would amount to a *devastavit* on his part. He is not to release the debt without sufficient compensation, but ought to suffer the suit to

go on, to ascertain the amount of the debt. He may, perhaps, be entitled to intercept the money, when it is ascertained upon a trial how much is due; but he ought not to be allowed in this manner to prevent any trial from taking place. I think, therefore, that this plea ought not to stand.

HOLROYD, J. I think that this release ought not to be allowed to be available to the defendants, being given under such circumstances, and in the progress of the cause. I do not agree in the construction which has been put on the deed in the course of the argument; it seems to me to extend to property claimed by the wife in her representative capacity, and I think that this release is clearly in fraud of the deed of separation. Here, too, the husband is only named as plaintiff for conformity, and he ought not to be allowed to release the debt; for to do so would be a fraud upon the persons having an interest under the will of the testator.

BEST, J. This action is brought on the faith of the stipulation contained in the deed of separation; and I think that the husband ought not, under such circumstances, to be allowed to release the debt, and so altogether [423] to defeat the action.

Rule absolute.(s)

(a) See *Legh v. Legh*, 1 Bos. & Pul. 447. [See also Cary's Rep. 124, (ed. 1820,) *Senky v. Golding.*]

CAMPBELL and Others v. INNES.

Upon a policy effected (after the declaration of war by America, but before it was known in England,) in which it was not stated in the policy, nor communicated to the underwriter, that the assured was an American subject, and the loss happened in consequence of a seizure by the American government for a forfeiture for the breach of their non-importation act: Held, that the action could not be maintained, even after the war had terminated.

ASSUMPSIT on a policy of insurance, dated 30th July, 1812, upon the ship Mars and her cargo, from London to Norfolk, in Virginia, and from thence to Wilmington, in North Carolina, at a premium of six guineas per cent., *against all risks, American capture, or seizure included.* The declaration averred the interest in Messrs. Levy and Gomez, and stated a loss, by the ship being seized, detained, and carried away, by certain persons unknown to the plaintiff, to wit, by certain enemies of our lord the king. Plea, general issue. At the trial, before ABBOTT, C. J., at the Guildhall sittings after the last Hilary term, it appeared, that the ship and goods in question were the property of Messrs. Levy and Gomez, who were American subjects. The ship sailed on her voyage, laden with British goods, on the 22d July, 1812; and upon her arrival at Norfolk, in Virginia, the ship and cargo were seized by the collector of the customs for that port, and immediately prosecuted by the American government, as being forfeited for a breach of the non-importation act. The assured, in consequence, immediately abandoned the ship to the underwriters. It appeared, also, that war was declared "by the American government, [424] in June, 1812, before the ship sailed from England, but that circumstance was not known in England till after her departure. ABBOTT, C. J., was of opinion, at the trial, that as the ship was seized by the American government, on account of the war with America, and as the assured was an American subject, which circumstance was not stated on the face of the policy, and did not appear to be known to the underwriter when he subscribed the policy, the plaintiffs were not entitled to recover. He therefore directed a nonsuit. And now

Scarlett moved for a new trial, and contended, that here it being expressly stipulated, that the insurance should be against all risks, American capture, or seizure included, there was no objection to the plaintiff's recovering now; the war with America being at an end. The only question is, whether it be lawful

for an underwriter to contract to insure an American subject against the acts of his own government, and there is no case which says he may not do so by a special contract. Here it is expressly included in the risk ; and upon grounds of public policy there is no objection to the allowance of such insurances. The case of *Conway v. Gray*, 10 East, 536, may be cited to the contrary ; but the authority of that case has been much doubted. In *Simeon v. Bazett*, 2 M. & S. 99, Lord ELLENBOROUGH lays it down, that "the exclusion of risk occasioned by the act of the assured's own government is only an implied exclusion from the reason and fitness of the thing, which may be rebutted by circumstances ;" *425] and he adds, in another place, that "there is no doubt that an insurance upon an American ship against American embargo might be good, notwithstanding the act of embargo might be considered as an act of the party's own government who effected the insurance. For not only an insurance against the act of his own government but even against his own act might be good, if the underwriter was disposed to enter into so hazardous a risk." Here there is an express stipulation introduced into the policy, and the contract was, no doubt, made with a view to the very risk which afterwards occasioned the loss.

ABBOtt, C. J. In this case, the policy did not show that the property belonged to an American subject, nor did it appear at the trial that the underwriter was acquainted with that fact. Now an American subject, to whom a ship and goods are consigned in America, if he knows that he is insured against a loss of this description, may not only omit to take proper means for preventing such loss, but may possibly facilitate it by giving information to his own government upon the subject. I think that that is a risk which the underwriter ought to know before he subscribes the policy. I thought, at the trial, that, as it did not appear by the policy, and was not communicated to the underwriter in this case, that this property belonged to an American subject, the plaintiffs were not entitled to recover ; I am of the same opinion still. This rule must, therefore, be refused.

BAYLEY, J. In *Simeon v. Bazett*, the underwriter was fully acquainted with all the circumstances, and it was distinctly in the contemplation of both parties there to insure against the act of the government of the assured. (a)

*426] *It was upon that ground that the underwriter was held to be liable. But in this case it does not appear that the underwriter knew the ship and goods to be American property. Now that makes a material difference in his risk ; for, if the property be British owned, of course the owner will do all in his power to prevent the risk from occurring ; but if it be American owned, he may, if he be secure of payment by the underwriter, lend himself to the purposes of his own government, and assist them in obtaining possession of the property insured. As it does not, therefore, appear distinctly that this was a risk within the contemplation of the underwriter, at the time he subscribed the policy, I think that the nonsuit was right.

HOLROYD and BEST, Justices, concurred.

Rule refused.

(a) [See 2 Amer. Law Journal, 230 ; 5 Johns. Rep. 318.]

CAMPBELL and Others, Executors of DONALDSON, v. INNES.

The importation of goods from America, in a vessel American-built, though owned by British subjects, is not legalized by 49 G. 3, c. 59.

ASSUMPSIT on a policy of insurance on the ship Manhattan and cargo, from Virginia to Great Britain. Plea, general issue. At the trial at the last sittings at Guildhall, before ABBOtt, C. J., it appeared that the ship was built in America, but was the property of Messrs. Osborne and Co., who were British subjects, and by them was chartered for this voyage to Donaldson, who was also

a British subject. The cargo consisted of timber, the produce of the United States. Upon this it was objected, that the voyage was illegal, being in violation of the navigation laws. *The learned judge was of this opinion, [*427] and directed a nonsuit. And now

Scarlett moved, by leave, to enter a verdict for the plaintiff. It is quite clear that if this had been an American ship, and owned by Americans, the importation would have been legal. For, by 49 G. 3, c. 59, an importation of American goods in American vessels is permitted, on payment of the like duties, as if imported in ships not British-built. Then the circumstance that this vessel is British owned cannot make a difference; for the case of *Long v. Duff*, 2 B. & P. 209, shows, that the policy of the legislature in such cases is not to prevent British subjects from employing foreign ships in neutral trade in as ample a manner as they can be employed by aliens.

Abbott, C. J. I think the nonsuit right. The difficulty is this: the importation is not legalized by 49 G. 3, c. 59, because that act is confined to ships American owned, and here the owners of this ship were British subjects. Nor can the importation be legal as being in a British ship, because the register acts prevent this vessel, being American-built, from being so considered. The case of *Long v. Duff* is very distinguishable. There the question turned on the words of the convoy act, and it was held that a foreign-built ship, British owned, was not required to be registered. But that case contains no decision on the point, whether an importation of goods in a vessel of that description would, in a case like this, be legal.

Rule refused.

***HETHERINGTON and Another v. VANE, Bart., and
Others.**

[*428]

Where the plaintiff, being possessed of house and land in E., had for sixty years exercised rights of common in W.; but it appeared that this was done near the boundary of the two commons of W. and E., which lay open and uninclosed adjacent to each other; and it also appeared that the parties exercising the right did not, at the time, know the exact boundary, and that plaintiff had on a previous inclosure of the E. common obtained an allotment there in respect of his estate: *Held*, that the judge was right in leaving it to the jury to say, whether the evidence was referable to an exercise of the right in E. and a mistake of the boundary, or to an exercise of the right in W.

THIS was a feigned issue to try the right of the plaintiff to an allotment of common in the manor of Wythop, in the parish of Brigham, in the county of Cumberland. The claim was, that plaintiffs, as owners and proprietors of lands and tenements in the township of Embleton, were entitled to right of common of pasture within the manor of Wythop. At the trial at the last Carlisle assizes, before *Best*, J., it appeared, that the commons of Wythop and Embleton formerly lay open and uninclosed, adjacent to each other, and that the boundaries between them were not at that time distinctly ascertained, nor until about seven years ago, when the boundary was settled in consequence of an action between the Earl of Egremont and Sir Frederick Vane. The plaintiffs were proprietors of a house and land in Embleton; and it was distinctly proved, that they and their predecessors had, for sixty years past, heased their sheep and exercised other rights of common, in places which, on the settlement of the boundary, proved to be on the Wythop side of it. It was also proved, that the proprietors of the estate had most commonly washed their sheep at a brook in Wythop, but occasionally also in one at Embleton. It appeared, however, that at the time these acts were done, the parties doing them were wholly ignorant of the exact boundary, and that the plaintiffs had on a previous inclosure of the Embleton common applied for and received an allotment in respect of this estate.

*The learned judge left it to the jury to say whether this evidence [**429] was referable to an exercise of a right of common within Embleton.

and a mistake as to the exact boundary, or whether it was to be considered as an adverse enjoyment in Wythop, with the knowledge of the commoners there, and acquiesced in by them. The jury found a verdict for the defendants. *Scarlett* moved for a new trial, on the ground that this was a misdirection on the part of the learned judge. The rights were in fact exercised within the manor of Wythop, and that for a long period of time ; and the parties must be taken to be cognisant of their own boundaries, and to have acquiesced. No doubt can be entertained that a right of common, in respect of a tenement not within the manor, may be acquired by usage. And he referred to a case tried before *BAYLEY*, J., at Carlisle, where a different rule had prevailed.

But the court were of opinion, that the learned judge had in this case correctly left the question to the jury, and that the jury had come to a right conclusion. And *BAYLEY*, J., added, that in the case before him there was not any dispute as to the boundary, and that the question was not, as here, to which of two commons the exercise of the right was applicable.

Rule refused.

*The KING v. HUNT.

Upon the trial of an information for a libel, only ten special jurymen appeared, and two tales-men were sworn on the jury. It is no ground for a new trial that two of the non-attending special jurymen named in the pannel had not been summoned, though it appeared that this fact was unknown to the defendant until after the trial.

This was an information by the attorney-general against the defendant, for a libel. At the trial, at the last sittings at Westminster, before *Abbott*, C. J., when the case was called on, only ten of the special jury attended. Two tales-men were accordingly sworn, and the defendant was convicted. And now

Denman moved for a new trial, upon the affidavits of two of the special jurymen, who had not attended, stating, that they had not been summoned, and also on the affidavits of the defendant and his attorney, that they were wholly ignorant of that fact till after the trial was over ; and he contended, that it was absolutely necessary that all should be summoned ; for if two may be omitted, so may any other number ; and so a selection may be made of particular persons to try the cause. It may be said, that for this the sheriff is punishable, but that is no advantage to a defendant who suffers by his improper conduct. But the act of parliament is imperative, for it requires all to be summoned. The trial is altogether wrong in consequence of this omission, and the defendant is entitled to a new trial. He referred to *Hill v. Yates*, 12 East, 229 ; *Parker v. Thoroton*, Str. 640, 2 Ld. Raym. 1410, and *Dovey v. Hobson*, 2 Marsh. 154.

Abbott, C. J. No case has been cited which is a direct authority on this question, so as to form a ground *for our decision ; we must, therefore, look to the principle on which this application is founded. There has, in this case, been an omission to summon two of the special jurymen. The court is not without proof to suspect any fraud on the part of its officers. It is not suggested, in this case, that the omission has been in consequence of collusion with any other person. If, then, on these affidavits, we were to grant a rule, we should intimate it to be our opinion, that in every case which may be tried, whether civil or criminal, if the party against whom the verdict passes chooses to apply, he will be entitled, as of right, to a new trial, in case he shows to the court that any one jurymen has not been duly summoned to attend. This would be going a great deal too far. I think, therefore, that we ought not to grant this rule.

BAYLEY, J. I am of the same opinion. If we were to accede to this application, it would be equally competent to the crown, in case of an acquittal, to have a new trial, as of right ; and, therefore, our granting a rule in this case would tend to deprive defendants of the protection which the law at present

gives to them ; and this would apply to all cases, criminal as well as civil. It would surely be a monstrous proposition to contend, that, after an important question has been determined at nisi prius, the losing party might have a new trial, because the sheriff had omitted to summon one common juryman out of the whole pannel. It is argued, that if so, the sheriff might omit to summon all the special jurymen but one. But if such a case were to occur, the court would have no difficulty ; for it is clearly competent to them, in their discretion, to grant a new trial. This is not an application of that sort ; but if it were, I should be of opinion, that as there is no reason to think the jury wrong in their verdict, the court ought not to interfere. [432]

HOLROYD, J. It does not appear, upon these affidavits, that any reason is suggested why the sheriff omitted to summon these two jurymen, or that it was done in consequence of any improper practice. We cannot, in the absence of proof, presume that any thing has been done corruptly. If that were so, still I think that this could not be considered as a mistrial. If it could, great mischief, as it seems to me, would follow. In crown cases, all the acquittals would be void, and the parties might be tried again ; but I think that the trial cannot so be treated as a nullity ; and, as there is no other ground for the present application, I am of opinion that there should be no rule.

BEST, J. It is distinctly stated, in *Dovey v. Hobson*, by Lord Chief Justice GIBBS, that applications of this sort must be to the discretion of the court, and that they will, if justice requires it, accede to them. From any other way of considering the question, great mischief would ensue. In cases of felony or treason, where a party has been acquitted, it would follow, that the crown, on proving an omission by the sheriff to summon one juryman, might try the case a second time. Taking it to be an application to our discretion, is it shown that any injustice has been done ? The true rule is this, if the officer has not done his duty, he is to be punished for it ; and if his omission has actually produced prejudice to the party, then it is in the discretion of the court [433] to prevent injustice being done, by granting a new trial. In this case, the omission is not shown to have been prejudicial to this defendant ; and therefore I think the rule ought to be refused.

Rule refused.

DOE, on the Demise of LLOYD and Another, v. DEAKIN and Another.

The fact of a tenant for life not having been seen or heard of for fourteen years by a person residing near the estate, although not a member of his family, is prima facie evidence of the death of the tenant for life.

EJECTMENT for certain premises, situate at Trewillan, in the county of Salop. Plea, general issue. The demise was laid in the year 1818. At the trial, at the last assizes for the county of Salop, before GARROW, B., it became necessary, in order to establish the case for the lessors of the plaintiff, to prove the death of Thomas Tannatt, who had been tenant for life of the premises. It appeared that he was born in February, 1759, and had been a wanderer during the greater part of his life, having been absent from his relations from 1787 to 1804. In 1804 he returned, and having remained a short time, went away again. Since that time he had not been seen in the neighbourhood. These facts were deposed to by a person who resided near the spot ; but no one of the family was called as a witness. The learned judge directed the jury that this was prima facie evidence from which they might presume Tannatt's death, and the jury accordingly found a verdict for the lessors of the plaintiff.

Pearson now moved for a new trial, and contended, that this was not even prima facie evidence. It may be admitted [434] that an absence of fourteen years, where the individual has not been heard of during all the time, may furnish a presumption of death ; but that must be with reference to the

particular circumstances of each case, and the persons proving it. If any of the relations had been called, and had proved these facts, it might have been different; but here it is the evidence of a mere stranger, residing in the neighbourhood. All that it proves is, therefore, a mere absence from the particular place for fourteen years; but no presumption of death arises from that circumstance alone. Here, too, Tannatt was only fifty-nine years of age at the time of the demise.

Per Curiam. The evidence unanswered was sufficient to found a presumption of Tannatt's death. And although the demise was laid in 1818, yet, in making the presumption, the jury might properly take into consideration the additional fact, that, up to the time of the trial in 1821, he had not been seen in the neighbourhood where this property was situate, to which, if he had been alive, he would have been entitled. In *Doe v. Jesson*, 6 East, 85, (a) Lord ELLENBOROUGH states, that the presumption of the duration of life with respect to persons of whom no account can be given ends at the expiration of seven years from the time when they were last known to be living. The probability here is, that as he was entitled to this property, he would come into the neighbourhood to claim it. If any of the family had heard of him since 1804, they might be called to rebut the presumption. And if Tannatt be still alive, he may recover the possession from the lessors of the plaintiff. This rule must, therefore, be refused.

Rule refused

(e) [See 1 Chitty Pl. 30 n.]

*PHILLIPS v. SHAW.

In assumpsit for not indemnifying plaintiff in consequence of his having become bail for A. in an action at the suit of B., it was stated that B., in Michaelmas term, 58 G. 3, recovered against plaintiff. The judgment given in evidence was in Hilary term: *Held*, that this was no variance, inasmuch as this was not matter of description, but an allegation in substance that the judgment had been obtained before the commencement of the action.

ASSUMPSIT. The declaration stated, that one Thomas Pinnock had been sued by Daniel Page in an action of assumpsit for a debt, and that whilst such action was depending, in consideration that plaintiff would become bail for Pinnock, defendant undertook to indemnify him. That plaintiff accordingly became bail for Pinnock jointly with defendant, and on 24th June, 1816, duly entered into a recognisance of bail, whereby they consented that the damages should be levied on them, in case Pinnock did not pay them, or render himself to custody. It then stated, that such proceedings were afterwards had in the said action, that said Daniel Page afterwards, to wit, in Michaelmas term, 58 Geo. 3, in the court of king's bench, recovered and obtained judgment in the said action against Thomas Pinnock for a large sum of money, as in and by the record of the said judgment still remaining in king's bench will appear. It then set out an action commenced by Page against plaintiff, upon the recognisance of bail, by which plaintiff was damned: breach that defendant had not indemnified him. Plea, general issue. At the trial before ABSOTT, C. J., at the last Guildhall sittings, it appeared, on the production of the office-copy of the record, i. *Page v. Pinnock*, that the judgment in that case was obtained in Hilary term, 58 Geo. 3, whereupon it was objected, that this was a fatal variance from the statement in the declaration. The learned judge, however, overruled the objection, and the plaintiff obtained a verdict. And now

*F. Pollock moved, by leave, to enter a nonsuit. This was a fatal variance. This is in fact part of the description of the record. *Purcell v. Macnamara*, 9 East, 157, is distinguishable from this case. There it was held, that the acquittal might be stated either on the day on which it actually took place, or on the first day of the sittings at which the indictment was tried. Here the

question is, whether as the parties profess to state the judgment, they must not describe it correctly. In actions upon bills of exchange, if the day of the date, or that of any instalment, be set out in the declaration incorrectly, the variance is fatal, *Wells v. Girling*, 3 Bayly Moore, 79. For there the date is part of the description of the instrument.

ABBOTT, C. J. I cannot distinguish this case from *Purcell v. Macnamara*, which was decided after much consideration. There the allegation in the declaration was, that the plaintiff had on a certain day been acquitted. Now, that fact could only be proved by the production of the record of acquittal. When that was produced, it appeared that the acquittal had taken place not on the day stated in the declaration. But the court there held it sufficient. For the allegation in the declaration being of a substantial matter, and not being a description of the record of acquittal, was well supported by the proof. Here the substantial matter is, that before the present action was brought a judgment had been recovered by Page; and it was perfectly immaterial at what particular time that judgment was obtained. I think, therefore, that this was not a fatal variance.

Rule refused.(a)

(a) [See Carth. 113, *Venables v. Dafe*; Dalis. 55; Yelv. 94, *in notis*; 16 Mass. Rep. 133, *Paine v. Fox*.]

*SKINNER and Others v. STOCKS.

[*437

The joint-owners of a vessel engaged in the whale-fishery may sue a purchaser for the price of whale-oil, although the contract of sale were made by one of the part-owners, and the purchaser did not know that other persons had any interest in the transaction.

ASSUMPSIT for not accepting, pursuant to contract, a quantity of whale-oil. Plea, general issue. At the trial, at the last assizes for the county of York, before BAYLEY, J., it appeared that the plaintiffs were joint part-owners of a vessel employed in the whale-fishery, and the action was brought to recover the price of some whale-oil sold to the defendants. The contract had been made by Skinner alone, and the defendant had no knowledge at the time that any other persons were interested in the transaction. *Brougham*, at the trial, objected that, under these circumstances, the action could not be maintained by the present plaintiffs, because, if so, the defendant might be deprived of his right of set-off. For he cannot set off a separate debt of Skinner against the present demand. *Lloyd v. Archbold*, 2 Taunt. 324. The learned judge at the trial overruled the objection, and the plaintiffs had a verdict.

Brougham now renewed his objection, and moved for a nonsuit, by leave from the learned judge.

Per Curiam. The action may be maintained either in the name of the person with whom the contract was actually made, or in the name of the parties really interested. This is continually done in cases of policies of insurance. If the introduction of these names make any difference in fact to the defendant, by affecting his *right of set-off, he may perhaps apply to the court for [*438 relief. But the statutes of set-off, do not prevent the action from being maintainable in the names of all the parties interested.

Rule refused.(a)

(a) [Assumpsit to recover damages for a loss, by deceit in the sale of cotton-yarn. J. C. made the purchase for the plaintiffs; the bill was made in his name, and he paid the defendant by J. A.'s check; the defendant did not know at the time of sale that J. C. acted for the plaintiffs. Objection that the action should have been brought by J. C.]

The Supreme Court of Massachusetts held that the action was well brought. *Motley et al. v. Rogerson*. Suffolk, March term, 1816, MSS. See also 1 Campb. 337, *Duke of Norfolk v. Worthy*; 11 Johns. Rep. 23, *Vischer v. Yates*, acc.]

The Mayor and Commonalty of the City of YORK v. WELBANK.

A custom that none but a freeman, or the widow or partner of a freeman, should sell by retail in a city, or the suburbs, is valid in law.

ACTION upon the case. The declaration, after setting out letters-patent of the 19 Rich. 2, and 5 Jac. 1, incorporating the plaintiffs by the name of "The Mayor and Commonalty of the City of York," stated the following custom : " And whereas, also, within the said city there now is, and from time whereof the memory of man is not to the contrary, there hath been a certain ancient and laudable custom, there used, obtained, and approved, viz., that no person, not being free of the said city of York, other than and except the widow or partner in trade of a freeman of the said city, should or might, or shall or may, or ought to sell or put up to sale any wares or merchandises within the said city, or the suburbs, &c., by retail, or keep any inward or open shop, or other inward place or room, for show, sale, or putting to sale, by retail, of any wares or merchandises within the same." The declaration then stated, that the defendant had sold divers wares and merchandises, to wit, &c., by retail, and had kept a shop, &c., contrary to the form and effect of this said custom, he not being free of the said city, nor a partner in trade of any freeman, nor having any right so to do. Plea, general *issue. A verdict having been found, upon the facts of the case, for the plaintiffs, at the last assizes for the county of York, before **BAYLEY, J.**,

Hullock, Serjt., now moved for a rule nisi for arresting the judgment. In this case the custom laid in the declaration operates in restraint of trade, and is, therefore, bad in point of law. In *The Mayor of Winchester v. Wilks*, 6 Mod. 21, S. C. 2 Ld. Raym. 1129, which was an action upon the case for using the trade of a woollen-draper contrary to the custom of Winchester, which was similar to the custom here laid, **HOLT, C. J.**, said, that it was a point not determined whether such a custom be good, though many corporations pretended to it; and he added, that some corporations pretended to a right by custom to exclude foreigners ; but he thought they could not support it. In the report of the case by Lord Raymond, Lord **HOLT** is stated to have distinguished *Waganor's* case, 8 Co., on the ground that that case was upon the customs of the city of London, which are confirmed by act of parliament. In *The Gunmakers' Company v. Fell*, Willes, 388, Lord C. J. **WILLES** lays it down as a rule, that all general restraints of trade are bad. No doubt there are some exceptions to this, as if there be a good consideration given to the person restrained, or if such restraint appear to be of manifest benefit to the public. But in this case no such thing exists, for there is no good consideration given to the defendant, nor is the restraint at all for the benefit of the public. This custom is, therefore, bad, and the judgment ought to be arrested.

***ABBOTT, C. J.** Since the decision referred to, of *The Mayor of Winchester v. Wilks*, the case of *Woolley v. Idle*, 4 Burr. 1951, has occurred, which was a stronger case than the present. There it was held, that such a custom as the one stated in this declaration was valid in law. I am, therefore, clearly of opinion that there is no ground for arresting the present judgment.

Rule refused.

JOHNSON and Others v. BAKER.

Before the execution of a composition-deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed it. The surety, at the same interview, afterwards executed the deed in the ordinary way, without saying any thing at the time of execution : The deed was then delivered to one of the cre-

ditors, in order that he might get it executed by the rest of the creditors: *Held*, that this was to be considered a delivery of the deed as an escrow, and that all the creditors not having executed it, the surety was not bound.

COVENANT. The declaration stated a deed between Richard Bulpin, of the first part; William Porter and the defendant, of the second part; George Colman and Edward Palmer, of the third part; and the plaintiffs and certain other persons, creditors of Richard Bulpin, of the fourth part; which recited that R. B. then carried on the business of a linen-draper, and was justly indebted to the persons named parties of the fourth part, in the several sums of money set opposite to their names at the foot of the deed; and that he being unable to pay them in full, it had been agreed to pay 12*s.* in the pound, in full discharge, to be secured as to 7*s.*, part of such 12*s.* in the pound, by bills drawn upon and accepted by William Porter and the defendant; and as to 5*s.* in the pound, by bills accepted by Colman and Palmer. It then set out a covenant by the defendant, to pay the said sum of 7*s.* in the pound at or upon the 4th day of April. Breach, that defendant *did not pay, pursuant to his covenants, [*441] the sum of 7*s.* in the pound, on the debt of Bulpin, to the plaintiffs. The defendant, after craving over of the deed, pleaded, first, *non est factum*; secondly, that the deed was delivered as an escrow, and on condition that the same should not be delivered to the plaintiffs, but be utterly void and of no effect, unless certain creditors of the said R. B., and amongst others, certain persons carrying on trade under the firm of Cooper Brothers, being creditors of R. B., should sign the said indenture. It then averred, that this condition had not been complied with: *Et sic non est factum.* (a) Issues having been taken thereon, it appeared at the trial, before ABBOTT, C. J., at the last sittings at Guildhall, on the examination of Edward Symes, the defendant's attorney, who was the subscribing witness to the deed, that at the meeting at which the deed was executed by the defendant, there was a conversation respecting the difficulty which might arise, in case all Bulpin's creditors did not execute the deed, when it was stated that the deed should be void, unless all the creditors executed it. At this conversation the plaintiffs were not present, and the defendant subsequently, but at the same interview, executed the deed in the ordinary way, and without saying any thing at the time of the execution. The deed was delivered to Burnell, one of the creditors, who was to get it executed by the other parties. ABBOTT, C. J., at the trial, thought that the condition previously expressed, although not introduced into the act of delivery, was sufficient to make this a delivery of the deed, as an escrow; and as it appeared that the condition had not been complied with, he held that the plaintiffs were not entitled to recover, and directed a nonsuit.

**Marryat*, on a former day, moved to set aside the nonsuit. This is [*442] a delivery by the defendant, as his deed, and not as an escrow. In Sheppard's Touchstone, p. 56, the delivery of a deed as an escrow is said to be "where one doth make and seal a deed, and deliver it unto a stranger, until certain conditions be performed, and then to be delivered to the party." But he adds two cautions: "First, that the words used in the delivery be apt and proper; second, that it be delivered to a stranger, and one who is no party to it." Here neither of these requisites have been complied with; for the deed has been delivered without apt and proper words at the time of delivery, and the delivery was not to a stranger, but to a party to the deed. In Com. Dig., tit. *Fait.*, A. 3, it is laid down, that if it be delivered, as his deed, to a stranger, to be delivered to the party on performance of a condition, it shall be his deed

(a) [It is not necessary, though it is the usual practice, to plead a special *non est factum* in such case. Delivery as an escrow may be shown under the general issue. Bridgn. 100; 4 Esp. Rep. 255; 6 Mod. 217. Lord Holt says the defendant, by pleading thus, brings all the proof upon himself; whereas if he pleads *non est factum* generally, he turns the proof of whatever is necessary to make it his deed upon the plaintiff. See Sav. 71, 72; 3 Keb. 142.]

presently ; and if the party obtains it, he may sue before the condition performed. That is, therefore, an express authority in point.

Cur. adv. vult.

Per Curiam. We are of opinion, in this case, that there must be no rule granted. The conversation which, according to the evidence of Symes, took place immediately previous to the execution of this deed, must be taken as part of the whole transaction ; and if so, the subsequent delivery of the deed by the defendant was conditional, and not absolute on his part ; and then the defendant will be entitled to our judgment. The passage cited from Comyns' Digest is not correct. The authority quoted for the law there laid down is *Degory* *443] *and *Roe's* case, 1 Leon. 152, where it is undoubtedly so stated in the course of the argument by three judges, against the opinion of the fourth. But it does not appear in Leonard to have been finally decided ; and upon looking to the report of the same case, in Moore, 300, it will be found, that, ultimately, the case was decided the other way. That case is, therefore, an authority against the present application.

Rule refused.(a)

(a) [See 2 Mass. Rep. 452, *Wheelwright v. Wheelwright.*]

KUCKEIN v. WILSON.

A quantity of oats having been consigned by a merchant abroad, to be sold by J. S., who was a merchant as well as factor, he placed them in the hands of A., a corn-factor, as a security for advances made by him ; but the oats were not to be sold without the consent of J. S. They remained in A.'s possession, upon these terms, for nine months, when they were transferred to A. by a sale at the market-price. No money actually passed, nor were any account sales rendered ; but the amount of the price was allowed in account between J. S. and A., leaving a balance in favour of the latter : *Held*, that this was in substance a pledge, and not sale by the factor ; and that no property passed to A., although the jury had found it to be a bona fide transaction.

TROVER for 800 quarters of oats. Plea, general issue. At the trial at the 1st assizes for the county of York before BAYLEY, J., it appeared that the plaintiff, a Prussian merchant, in August, 1818, consigned to Sellers and Co., of Hull, as his factors, a quantity of oats for sale. The oats arrived in September, 1818. In December, 1818, Sellers and Co., who were merchants as well as factors, having accepted bills on account of the oats, which bills were afterwards paid, applied to the defendant for an advance, and being pressed for money, placed the oats which were then lying in the warehouses of Wilson and Co. in his hands for sale as a security for the loan of 840*l.* with interest. *The defendant was, however, not at liberty to sell the oats without their assent. The oats having remained in the defendant's hands unsold till the August following, he agreed with Sellers and Co. to become the purchaser of them at the market-price, and accordingly a settlement of the account between them took place upon that footing, and Sellers and Co. upon that account still remained indebted to defendant about 300*l.* The learned judge left two questions to the jury ; 1st, whether the transaction in August, 1819, was bona fide, which the jury found in the affirmative ; and, 2dly, whether in August, 1819, considering the circumstances under which Sellers and Co. were placed, they could properly, and in the honest discharge of their duty as agents, sell the oats to the defendant, knowing that by such sale no money would be produced which could be applied to the use of the plaintiff. The jury found a verdict for the plaintiff, damages 622*l.*

Scarlett, on a former day, by leave of the learned judge, moved to enter a nonsuit ; and he contended, that the jury having found the first point (viz., that the sale was bona fide) in favour of the defendant, he was entitled to judgment. For although it is clear that a factor cannot pledge, yet the subsequent sale in

this case takes it out of that general rule. As to the sale being to a creditor of the factor, he referred to *George v. Clagett*, 7 T. R. 359, and the other cases on that subject, as showing that a party buying goods of a factor bona fide, and without knowledge of the principal, is entitled to set off against them a previous debt due from the factor, and contended, that if *the rule laid down by [*445 the learned judge be correct, it would virtually overrule those decisions.

Cur. adv. vult.

The judgment of the court was on this day delivered by

ABBOTT, C. J. According to the learned judge's notes of this trial, it appears that Sellers and Co., residing in Yorkshire, received in August, 1818, from the plaintiff, a foreigner, a cargo of oats to be sold by them as his factors, and for his account. On the 28th of September, 1818, the whole quantity, viz., 745 quarters, was placed by Sellers and Co. in the warehouse of Wilson and Co., who were warehousemen at Hull. Wilson, the defendant, who was at the head of that firm, was also a corn-factor. On the 30th September, 1818, Wilson and Co. received from Sellers and Co. an order to deliver 10 quarters of these oats to a person of the name of Clarke, and on the 18th December they received an order to deliver the whole remaining quantity to Wilson, the defendant, or order, and place them to his account. On the 22d December, 1818, this quantity was accordingly transferred, in pursuance of the latter order. On the 20th December, two days previously to this transfer, Wilson had advanced 840*l.* to Sellers and Co. on the security of these oats, then lying at the warehouse of Wilson and Co., of which he expected to have the sale, accounting to Sellers and Co. for the proceeds, and paying or receiving the difference between the proceeds and the sum advanced, as the case might be. Upon this state of facts, it is evident that Wilson originally *took the oats as a pledge from Sellers and [*446 and Co., who had authority to sell, but not to pledge. In the month of September, in the following year, the oats were delivered by Wilson and Co. to different persons, by the orders of Wilson. If the proof had stopped there, it would be manifest that Wilson having taken the plaintiff's goods in pledge from persons who had no authority to pledge them, and having afterwards transferred and delivered them to others, would be answerable for their value to the plaintiff in an action of trover. It is to be seen, therefore, whether the rights of the parties were varied by any thing that occurred between the original pledge to Wilson in December, 1818, and his transfer or delivery of the goods in September following. Now the substance of the intervening transactions is this: Wilson repeatedly applied to Sellers and Co. for permission to sell the oats, and was refused. The market continually declined. Sellers and Co. dissolved their partnership. Sellers afterwards authorized one Tuke, a broker, to dispose of the oats; and in August, 1819, Tuke, thus authorized, agreed with Wilson, that he, Wilson, should himself become the purchaser at a certain rate, being the then market-price. At this time Sellers was in difficulties, and soon afterwards became a bankrupt, being at that time considerably indebted to the plaintiff. Tuke, who was a broker, did not enter this transaction in his broker's book, nor render any account sales; and being examined at the trial, he said that he did not consider this as a very regular transaction, and that he did not understand himself exactly as acting as a broker in the transaction. Upon this evidence there appears to be none of the ordinary characteristics of a mercantile sale, the price not being *actually paid by Wilson, and it being manifest [*447 that there was no intention that it should be paid. The intervening transactions amount to nothing more than an agreement, that the pawnee should take the pledge to himself at a fixed sum, to be set against the money that he had advanced upon the security of the pledge. Such an agreement does not in our opinion alter the nature of the original transaction, which was clearly a pledge; and the case may and ought to be decided in favour of the plaintiff upon the general principle which does not allow a factor to pledge, without

contravening either the case of *George v. Clagett*, 7 T. R. 359, cited at the bar, or, so far as I have been able to discover, all or any one of the unquoted cases or authorities which we were so earnestly cautioned not to overrule. This rule must therefore be refused.

Rule refused.

The KING v. The Inhabitants of the Parish of ST. BENEDICT, in the Town and County of CAMBRIDGE.

Where a road was set out by commissioners under a local act, and certain persons only were by the act to use it, but in fact it had been used by the public for many years, it was held that this was not sufficient evidence of a dedication to the public; and that if it was, there being no evidence that the parish had acquiesced in that dedication, it was not a public road road which the parish were bound to repair.

PRESENTMENT, in the usual form, by a magistrate against the defendants, for not repairing a highway. Plea, not guilty. The case was tried at the Cambridge Lent assizes, 1820, before GRAHAM, B., *when a verdict was found for the crown, subject to the opinion of this court on the following case. The road, which was proved to be out of repair, was situate in the defendants' parish, and was originally made under the provisions of a local act passed in the 41 Geo. 3. By a clause in that act the commissioners were directed to set out two specific private roads, therein particularly described, which, when set out, were to be used by such persons only as were entitled to use an old occupation-road, running in the same direction with the latter of the two roads. The commissioners acting in execution of this power, by their award, dated June 27, 1803, set out the road presented as one of these two roads. From the date of the award, however, until the finding of the presentment, the road had been used by the public without interruption as a carriage-way. The question was, whether under these circumstances this was a public road, which the parish was bound to repair.

Barnewall, for the crown. This is a public road, and, consequently, the parish are bound to repair it. It is clearly established, that a public right may be acquired by the user of that which was originally a private road. *The Trustees of the Rugby Charity v. Merewether*, 11 East, 375. The same rule applies to bridges. In *The King v. The West Riding of Yorkshire*, 2 East, 342, it was held that if a bridge be of public utility, and used by the public, the public must repair it, though built by an individual, and the use of it by the public was considered evidence that it was of public utility. In *Rex v. *Lloyd*, 1 Campb. 260, it was held, that a road originally made for private convenience, but which had been open to the public for several years, without any person who passed through it meeting with interruption, was to be considered as dedicated to the public, and that it became a highway, to obstruct which was an indictable offence. These are authorities to show, that where a road is originally made as a private road, even for the benefit of an individual, yet if it be permitted to the public to use it for a certain time, it is to be presumed that the owner thereby meant to dedicate it to the public, and it then becomes a public road. There is no distinction in point of principle between this case and the cases cited; for the clause in the act of parliament which directs that the new road should be used by such persons only as were entitled to use the old road is no more than a legislative declaration, which is implied by the common law in the case of every private road, that none but those having a right shall use it. It is clear that the old road might by user have become a public road, and the parish would then have become bound to repair it; and if so, there cannot be any reason why the new road, substituted for it by this act of parliament, should not also become a public road, by the same means.

Robinson, contra, was stopped by the court.

ABBOTT, C. J. I am of opinion that this was not a public road, and that the parish are not bound to repair it. It was in this case, as appears from the clause in the local act, compulsory on the owner of the soil to permit "a qualified passage, viz., to all persons entitled to use the old occupation-^[*450] road. That circumstance distinguishes this from the cases cited. If this be a public road, it would follow that wherever, under an inclosure act, an occupation-road was set out, and it happened to be convenient for passage, it would become, almost immediately, a public road, and the burden of repairing it would be thrown on the parish.

BAYLEY, J. I am of the same opinion. I do not accede to the doctrine, that because there is a dedication of the road by the owner of the soil, and the public use it, that the parish is therefore bound to repair. I think there ought to be, in addition to that, evidence of an acquiescence by the parish in that dedication. In the case of bridges, there always is what is to be considered as an acquiescence by the county. The county is not liable except for bridges made in *highways*; the making of the bridge, and thereby obstructing the road while the bridge is making, may be treated as a nuisance, and the county may, if it think fit, stop its progress by indictment, and the forbearing to prosecute in that way is an acquiescence by the county in the building of the bridge. But in the case of a parish, they have no power to prevent the opening of a road, or to obstruct the public use of it. It would be most unjust if, by the public use of what was at first a private road, the burden of repairing it could be removed from the persons to whom the use of it was at first confined, and cast upon the parish. Admitting, therefore, that in this case there was a dedication to the public, (which, I think, does not sufficiently appear,) and that the road was found to be a public benefit, (which I am not sure is the **case*,) I think ^[*451] that in consequence of the want of some act of acquiescence or adoption by the parish, they are not liable to the repair of this road.

HOLROYD and BENT, Justices, concurred.

Judgment for the defendants.

TURNER v. LEECH.

The endorser of a bill of exchange which had been dishonoured, and which a subsequent endorser had made his own by laches, paid the bill, and immediately gave notice of dishonour to the defendant, a prior endorser: *Held*, that the plaintiff could not recover the amount, although it appeared that the defendant, in case successive notices had been given by all the parties on the bill, could not have received notice of dishonour at an earlier period.

ASSUMPTION by plaintiff, as endorsee, against the defendant, as a prior endorser of a bill of exchange for 50*l.*, payable three months after date. Plea, general issue. The cause was tried at the Guildhall sittings after Hilary term, 1818, before Lord ELLENBOROUGH, C. J., when the jury found a verdict for the plaintiff, subject to the opinion of this court, upon the following case. The defendant was the eighth and the plaintiff the eleventh endorser of the bill of exchange, which was endorsed by him to Bennett, and by him to Fletcher, and by him to Hordern and Co., bankers at Wolverhampton, who transmitted the same to their London correspondents, Messrs. Sansom and Co., who were the holders when the bill became due. The bill was duly presented for payment on Saturday the 30th August, 1817, and dishonoured. On Monday, the 1st September, 1817, Sansom and Co., wrote to Hordern and Co., at Wolverhampton, duly informing them of such dishonour, which letter was received by them on Tuesday, the 2d September. Notice of the dishonour was, on the 2d September, given to Fletcher, and on Wednesday, the 3d September, a letter giving information of such dishonour, was sent by the post by Fletcher to Bennett, at *Stockport, where he resided, and which letter was delivered there at ^[*452] his shop, on Thursday, the 4th September. This letter was not opened,

and no notice was given to the plaintiff or any other party, before Monday, the 8th September. On the 8th September, the plaintiff first received notice of the dishonour, and immediately paid the amount of the bill to Bennett. John Davies, the tenth endorser, Washington and Horner, the ninth endorsers, and the defendant, the eighth endorser: all resided at Stockport. It was admitted, in addition, that the defendant had notice of the dishonour either on the 8th or 9th September, 1817.

Chitty, for the plaintiff. In this case the defendant received notice of dishonour on the 9th September at the latest; and if notice had been given to each successive endorser in the regular course, he would not have received it at an earlier period. Then he has received no injury by the neglect. Suppose the holder gives notice on the same day to six successive endorsers, and the seventh endorser receives notice of it six days afterwards, surely he ought not to be allowed to defend himself, on the ground of laches, when in the regular course he could not have received notice sooner.

J. Williams, contra, stopped by the court.

Abbott, C. J. In this case the plaintiff, who ought to have received notice of the dishonour of the bill of exchange from Bennett, on the 5th September, did not, in fact, receive notice till the 8th; and, therefore, he was clearly discharged by the laches of the holder. Then can he, by paying the bill, place *453] the prior endorsers "in a worse situation than that in which they would otherwise have been? I think he cannot do so; and that in paying this bill he has paid it in his own wrong, and cannot be allowed to recover upon it against the defendant.

Judgment for the defendant.

The Company of Proprietors of the MONMOUTHSHIRE Canal Navigation v. KENDALL and Others.

An act of parliament provided that the M. Canal Company should not take any higher or greater rate of tonnage than should, for the time being, be taken by the B. Canal Company; and the latter, by a resolution at a general assembly, and under their common seal, reduced their tolls: *Held*, that the M. Canal Company could not question collaterally the validity of such resolution, but were bound by it. The B. Canal Company's act directed that no reduction of the tolls should take place unless assented to by two-thirds of the proprietors; but allowed them to vote by proxy, a form for which instrument was given by the act. *Quere*, whether such instrument requires to be stamped?

THE declaration alleged that the defendants were indebted to the plaintiff for divers rates, tolls, and duties, for the tonnage of certain goods of the defendants, conveyed along a certain canal of the plaintiffs, and also for the use of the plaintiffs' canal, railways, and roads. The declaration likewise contained a count on a quantum meruit, with the usual money counts. The defendants pleaded the general issue, and paid into court the sum of 318*l.* The cause came on to be tried at the Monmouth Lent assizes, 1819, before RICHARDSON, J., when the jury found a verdict for the plaintiffs, damages, 206*l. 3s.*, subject to the opinion of the court on the following case.

By statute 32 G. 3, c. 102, the company of proprietors of the Monmouth Canal Navigation were established "with power to make and maintain a canal from Pontnewynydd, in the parish of Trevithin, into the river Usk, at the town of Newport, which canal was accordingly completed. By statute 33 G. 3, c. 96, the company of proprietors of the Brecknock Canal Navigation were established with the power to make a canal from the town of Brecon, to communicate with the before-mentioned Monmouthshire canal near Pontymoile, and to make railways as therein mentioned. By this act it was provided, that the said company of proprietors of the Monmouthshire Canal Navigation should pay to the company of proprietors of the Brecknock Canal Navigation the sum of 3000*l.*, upon the 25th day of March, 1794; and that in

default of payment the same might be sued for and recovered by action of debt or on the case, in any court of law ; and that the company of proprietors of the Monmouthshire Canal Navigation should not take or demand for any coals, goods, merchandises, or other things, which should pass or be navigated in boats or other vessels, upon the said Monmouthshire canal, to and from the said Brecknock canal, and passing thereon for two miles or upwards, any higher or greater rate of tonnage than should, for the time being, be taken by the company of proprietors of the Brecknock Canal Navigation, for any coals, goods, merchandise, or other things, passing or to be navigated on the Brecknock canal. The general assemblies of the proprietors of the Brecknock canal were directed to be held twice in every year, in April and October, for the purpose of choosing a committee ; and it was provided that a special assembly might at any time be called by *five of the committee, or ten proprietors, on causing notice [*455 thereof to be given in some newspaper published or circulated in the several counties of Brecknock and Monmouth, or in such other manner as the said company of proprietors should, at any general assembly, direct or appoint, declaring in such notice the place where and the time when such special assembly should be held, the place to be within such of the said counties of Brecknock and Monmouth respectively, where the cause of such meeting, if within either of the said counties only, should arise, and the time not to be less than fourteen days after such notice given ; and also specifying in such notice the reason for and intention of holding the same. It was further provided, that the tolls on the Brecknock canal should be fixed at a general assembly of proprietors ; and that it should be lawful for them, from time to time, at any general or special assembly to be held for that purpose, of which three calendar months' notice at the least should be given in the manner hereinbefore mentioned, to lower or reduce such of the said rates and tolls to be fixed as aforesaid, as the said company of proprietors should think proper ; and afterwards, from time to time, at any general or special assembly, of which the like notice should be given, to advance and raise all or any of the said rates or tolls so lowered or reduced ; provided always, that the said rates and tolls so to be advanced or raised as aforesaid should not in any case exceed the respective rates and tolls thereinbefore authorized to be taken, and that no reduction of the said rates or tolls should be made without the consent of so many of the said proprietors as should be possessed of at least two-thirds of the whole number of shares in the *said undertaking : it also provided, that the proprietors at the general [*456 or special assemblies might vote by proxy. The proxy was directed to be as follows : "I A. B., one of the proprietors of the Brecknock Canal Navigation, do hereby nominate and appoint G. H. to be my proxy in my name, and, in my absence, to vote and give my assent to or dissent from any business, matter, or thing relating to the said navigation and undertaking, which shall be mentioned or proposed at a meeting of the proprietors of the said navigation, or any of them, in such manner as the said G. H. shall think proper, according to his opinion and judgment, for the benefit of the said navigation and undertaking, or any thing appertaining thereto. In witness whereof, &c." The plaintiffs paid to the Brecknock Canal Company the said sum of 3000*l.*, on the 25th March, 1794. The following notice was published in the Cambrian newspaper on the 1st February, 1817, this being the earliest day of its being published in any newspaper : "Brecknock Canal Navigation : We, the undersigned, being proprietors of four or more shares in the said navigation, do hereby give notice, that at the general assembly to be held in the town of Brecknock, on the last Thursday in the month of April next, we intend to bring forward a motion and pass a resolution to reduce the several tonnages on the canal and railways of the company, on coal, lime, lime-stone, iron, and iron-stone, and on articles carried along the canal for the purpose of manufacture, and the manufactured produce of which is afterwards carried back along the canal." On the 24th April, 1817, a gene-

ral assembly of the proprietors of the Brecknock Canal Company was held. At *457] this meeting, the motion contained *in the foregoing notice was brought forward, and a great number of proxies were produced, in the form prescribed by the act, but without any stamp ; and if these proxies were valid, the proprietors of more than two-thirds of the whole number of shares in the Brecknock company attended in person, or were lawfully represented, and gave their consent to the order hereinafter mentioned, for reducing the tolls on the Brecknock canal from 3d. to 2d. per ton per mile. The order agreed to at the said meeting was as follows : " It appearing to this meeting, that, by the reduction of the tolls and tonnages on iron carried along this canal, and the railway thereto belonging, great advantage is expected to accrue to the company of proprietors ; Resolved, unanimously that such tolls and tonnages on iron be reduced from 3d. per ton per mile to 2d. per ton per mile, and that such reduction commence from the 29th day of March last ; any order or regulation to the contrary notwithstanding." The seal of the Brecknock Canal Company was affixed to this order. From the completion of the Brecknock canal to the making of the order, the full tonnage of 3d. per ton on iron was uniformly taken by the company of proprietors of that canal. Since the making of the order, the toll, in point of fact, taken on the Brecknock canal, had been only 2d. per ton per mile. The question for the opinion of the court was, whether the plaintiffs had a right to be paid for the defendants' iron carried along their canal, at the rate of 3d. or 2d.

Campbell for the plaintiffs. This question depends on the construction which the court will give to the clause by which the plaintiffs are precluded from *458] taking *any higher toll than that taken by the Brecknock company. This must mean the toll legally taken by them, and not the toll actually taken. Unless that be so, it would follow that, upon an increase, even without authority by the Brecknock company, the plaintiffs would legally be entitled to an increased toll. The advantage or disadvantage must be reciprocal. It is admitted, that the plaintiffs can only take such toll as the Brecknock company legally take. Now the toll legally taken by the latter, previously to April, 1817, was 3d. Then was it legally lowered on that occasion ? In order to establish that, it must, according to the act of parliament, be shown that the alteration was consented to by two-thirds of the proprietors. And if the proxies were not admissible, such consent was not given. Now a proxy was not admissible without a stamp. By 55 G. 3, c. 184, schel. part 1st, every letter or power of attorney of any kind, or commission, or factory in the nature thereof, and every deed or other instrument of procuration, are required to be stamped. Now this is in its form a letter of attorney. The form is, I appoint G. H. to be my proxy, and whatever he does is ratified by the principal. At all events it is an instrument of procuration. The very word proxy, which is an abbreviation of the word procuracy, shows this. Then if so, there are various statutes, all of which are embodied in 55 G. 3, c. 184, which show that such instruments, if unstamped, are not available in any manner in law or equity, or in any manner whatsoever. The statutes 37 G. 3, c. 19, s. 3, 37 G. 3, c. 19, s. 9, clearly show this. Here then the proxies were not available to show the consent of two-thirds of the proprietors to the reduction of the tolls. Besides, *459] in this *case the notice was insufficient. By the act no alteration in the tolls, whether at a general or special meeting, can be made, unless there be three months' notice. But here no such notice was given. The order therefore was on both grounds a nullity, and there has been no legal lowering of the toll from 3d. to 2d. The last toll legally taken on the Brecknock and Abergavenny canal was 3d., which, therefore, is the toll legally to be taken by the plaintiffs. If so, they are entitled to the judgment of the court.

G. R. Cross, contrâ. The plaintiffs might be entitled to judgment, if they could show that the toll actually taken on the Brecknock canal, was so taken

fraudulently, and without colour of authority. But here the toll was fixed at a general assembly of the proprietors, and by a resolution under their common seal. It was therefore quite sufficient to justify the words of the act, and besides the plaintiffs, who are strangers to the transaction, have not any right collaterally to question the regularity of these proceedings.

He was then stopped by the court.

ABOTT, C. J. The act of parliament upon which this question depends, has provided, that the company of proprietors of the Monmouthshire canal shall not take any higher or greater rate of tonnage than shall, for the time being, be taken by the company of proprietors of Brecknock canal. The question therefore is, whether the present plaintiffs are entitled to any higher toll than that which, in fact, has been taken upon the Brecknock canal; and I am clearly of opinion that *they are not. If, indeed, without any colour of authority, the rates upon the Brecknock canal had been lowered, the [*480] case would have been very different. But the facts here stated show, that the reduction in the tolls has been made by a resolution passed at a general assembly, and under the seal of the company. I think, therefore, that a reduction, by virtue of such a resolution, clearly brings the case within the clause of the act, and that it is quite unnecessary for the court to determine the question relative to the validity of the proxies, and the sufficiency of the notice; for I am clearly of opinion, that it is not competent for the plaintiffs collaterally to question the validity of the resolution passed by the proprietors of the Brecknock canal at their general assembly. I am, therefore, of opinion, that there must be judgment for the defendants.

BAYLEY, J. In this case it appears, that the toll of 2d. is the one actually taken upon the Brecknock canal; but it is argued, that in this case it is competent for the plaintiffs to show, that the Brecknock Canal Company have not complied with certain requisites prescribed by their act of parliament, and are, therefore, not warranted in reducing the toll to the sum actually taken. But it seems to me, that the plaintiffs have no right to raise this question; for the forms prescribed by the act of parliament were only intended for the purpose of regulating the interests of the Brecknock Canal Company, *inier se*; and if they are satisfied with the reduction of the tolls, it seems to me that the plaintiffs are not entitled to raise any objection. The act of parliament has prescribed, that the plaintiffs shall take no higher toll than is taken by the Brecknock Canal Company; *and I think, therefore, that the plaintiffs have no claim in the [*461] present case.

HOLROYD, J. In this case, it seems to me, that the resolution of the Brecknock Canal Company reducing their tolls, being under their common seal, the court are called upon to decide as to the validity of that resolution. As long as the proprietors of that canal choose to submit to it, it is not competent for the present plaintiffs to dispute its validity. I think, therefore, that there should be judgment for the defendants.

BEST, J. If it were necessary to determine whether a proxy required a stamp, I should desire time to consider of that question; but it is not necessary for the determination of the present case. I agree with the rest of the court, that the regulations in the act of parliament are solely for the protection of the Brecknock Canal Company. If they assent in the resolution for the reduction of the tolls, it is not competent to the present plaintiffs to show that such resolution was irregularly passed.

Judgment for the defendants.

*462] *The KING v. The Inhabitants of ST. MARY, in BURY
ST. EDMUNDS.

The determination of the commissioners under an inclosure act, as to the boundaries of a parish to be inclosed, is not conclusive of the fact as to what were the boundaries antecedently to such determination.

UPON appeal against an order of two justices, by which George Cutting, Sarah, his wife, and four children, were removed from the parish of Rougham, in the county of Suffolk, to the parish of St. Mary, in Bury St. Edmunds, in the same county, the sessions confirmed the order, subject to the opinion of this court, on the following case. The pauper, in 1783, gained a settlement, by hiring and service, in a house called Eldo Farm, which lay partly in Rougham, and partly in St. Mary, in Bury. He had, at different times afterwards, in the course of 30 years and upwards, and up to the time of the removal, been relieved by Rougham, while living in another parish. In the years 1813 and 1814, separate inclosures took place of lands in Rougham and Bury. Under the Rougham inclosure act, in 1813, the commissioners, in their award, ascertained and fixed the boundary line between Rougham and St. Mary, in Bury, and thereby included within the latter, the apartment in which the pauper slept during his service at the Eldo farm ; and the commissioner under the Bury inclosure act, in 1814, also ascertained and fixed the boundaries of Bury by his award, and thereby found and declared, that the boundary of the parish of St. Mary, in Bury, proceeded along the boundary of Rougham parish, through the Eldo farm-house, as the same had been ascertained and fixed under the Rougham inclosure. In a perambulation also made subsequently *to these acts, *463] the parishioners of Bury included the apartment in which the pauper slept within the parish of St. Mary, in Bury. These facts being proved by the respondents, the appellants contended, that the boundary line set out by the commissioners was not conclusive, as to the actual boundary before the award, and tendered to the court evidence to prove, that, before the inclosure acts, the spot in question was in Rougham. This evidence was objected to ; and the court, considering the award of the commissioners as retrospective and conclusive, rejected the evidence, and confirmed the order of removal.

Nolan and *Robinson* in support of the order of sessions. This evidence was properly rejected. By the 41 G. 3, c. 109, s. 3, the commissioners under an inclosure act are authorized to inquire into the boundaries of the parishes to be inclosed, and to set out the same ; and the clause then states, that " after such boundaries shall be so ascertained, set out, determined, and fixed, the same shall, and they are hereby declared to be the boundaries of such parishes, &c." This, therefore, makes the decision of the commissioners final and conclusive. And the word "declared" shows, that, in construction of law, before such decision, the boundaries have always been as fixed by the commissioners. Then if so, the evidence to contradict the award was inadmissible.

Storks and *Dover*, contrà. The general object of an act of parliament must be looked at. *Edwards v. Dick*, 4 B. & A. 212. The object here, was only *464] to ascertain the *boundaries, for the purpose of arranging the different claims of individuals under the inclosure. It could have no reference to questions of this description. The local act gives an appeal to parties interested, which shows that the determination could not be intended to have a retrospective effect ; for how could there have been any appeal against this determination, either by the churchwardens or by the pauper, who may both be interested in the question, as to his place of settlement. Many inconveniences may be pointed out, in case this decision of the commissioners be held to be retrospective ; and it is not at all necessary, for any purpose of inclosure, that it should be so. Suppose a will, made previously to the award, described the lands devised as "all my lands in Rougham," it would follow, that this land would not pass

Many other instances may be put, in which similar inconveniences would follow. The proper construction is, therefore, that the determination of the commissioners has only a prospective effect. Here the question was, what the boundary had been before their award, and evidence on that point ought to have been received.

ABBOTT, C. J. It seems to me, that great mischief might follow, if the court were to hold, that the decision of the commissioners in this case, as to the boundaries of the parish, was conclusive, and at the same time retrospective; for many cases may be put, both of fines of lands and wills, in which such a decision might materially affect the rights of third persons. The best and safest course, therefore, will be, to hold such determination not to be conclusive evidence of what the boundaries were previously to the period when it was made. In that case the sessions ought to have received *the evidence which they have rejected; and I think, therefore, that the order of sessions [*465 should be quashed, and the case sent back to be reheard.

BAYLEY, J. If the decision of the commissioners were conclusive, to show what the boundaries of the parish were in times past, it might happen that a mistake on their part might make it necessary to apply to the court of common pleas, for the purpose of amending a fine of lands, levied before the inclosure; and if the two parishes between which the boundary was ascertained, lay in different counties, that court would be unable to amend the fine. That is one inconvenience which might arise from our holding such determination to have a retrospective effect. I agree, therefore, that this evidence ought to have been received.

HOLROYD, J. The words of the statute do not appear to me to be retrospective: they only state that the commissioners shall ascertain the boundaries; and "after they shall be so ascertained, the same shall and are hereby declared to be the boundaries of such parishes, &c." Now these words do not necessarily import that the boundaries to be ascertained were the boundaries before that period. Considering, therefore, that cases may occur in which mistakes made by the commissioners may affect the private rights of others, I am of opinion, that we ought not to go further than we are compelled by the strict words of the act; and I think that the evidence ought to have been received, and that the case should go back to the sessions.

BEST, J., concurred.

Case sent back to the sessions.

*MARR v. SMITH.

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The plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record: *Held*, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied.

DENMAN had obtained a rule nisi for discharging the defendant out of custody. It appeared from the affidavits, that the plaintiff had recovered a verdict against the defendant, at the last Summer assizes for Nottingham, for 598*l.*, for which sum final judgment had been obtained in last Michaelmas term, the costs taxed at 62*l. 4s.*, and the defendant taken in execution for the whole amount. Subsequently to this the plaintiff and defendant compromised the suit, upon the defendant's assigning over to Wells, an attorney, at Nottingham, for the benefit of the plaintiff, a sum of 128*l. 5s.*, due from a third person to the defendant. This sum, it appeared from the affidavits, Wells had not hitherto received. On the 24th March last, the plaintiff executed a warrant of attorney prepared by Wells, authorizing certain attorneys of this court to enter satisfaction upon the record; which was accordingly done. The affidavits, in answer, stated that the whole transaction was fraudulent and collusive, and without the know-

ledge, privity or consent, of the plaintiff's attorney, and that it was done with a view to defraud him of his costs. It was further sworn, that the defendant, who had himself been an attorney, had been expressly informed that the costs of the plaintiff's attorney were wholly unpaid, and cautioned against settling with the plaintiff, until those costs had been satisfied.

Reader showed cause, and contended, that the defendant was not entitled to be discharged, the lien of the *plaintiff's attorney not having been satisfied. And he cited *Welsh v. Hole*, Douglas, 238; *Read v. Dupper*, 6 T. R. 361; *Randle v. Turner*, 6 T. R. 456, and *Swain v. Senate*, 2 N. R. 99, as authorities in point, to show that the plaintiff is not at liberty to settle the debt, and so to defraud his attorney of his lien for his costs.

Derman, contra, contended, that no case had been cited, in which it had been held, that the plaintiff's attorney had a lien on the defendant's body. In *Graves v. Eades*, 5 Taunt. 429, the court, after a discharge by the plaintiff, refused to permit the attorney to sue out a second execution for his costs. Here, after satisfaction has been entered on the record, the defendant is entitled to his discharge.

ABBOTT, C. J. I cannot but disapprove very much of the conduct of the defendant, who, having been an attorney himself, must have known that the attorney for the plaintiff had a lien for the costs on the judgment recovered. But here the plaintiff has, by a new attorney, caused satisfaction to be entered on the record; and there is no authority for saying that, under such circumstances, the court can refuse to discharge a defendant out of custody. I am, therefore, of opinion that the rule must be made absolute.

BAYLEY, J. This case was before me at chambers, and I then refused to discharge the defendant; and for this reason, amongst others, that I doubted whether, in vacation, *a single judge had a power to do so; but now I *468] am of opinion, that this rule ought to be made absolute. For it seems to me that we should go a great deal too far, if we were to hold that the attorney for the plaintiff, in opposition to his client's wishes, and after satisfaction has been entered on the record, may, on account of his lien for the costs, still keep a defendant in custody. Here the judgment has been satisfied, and upon that ground the defendant applies to be discharged. The case of *Martin v. Francis*, 2 B. & A. 402, is a strong case for the defendant. There, the plaintiff's attorney had ordered the sheriff not to discharge the defendant, stating, that he had a lien for his costs, notwithstanding which, by the plaintiff's directions, the sheriff afterwards discharged him; and, an application having been made that the sheriff should pay the attorney's costs, the rule was discharged: on the ground that the attorney had no lien on the defendant's body. In this case, the settlement is stated to be made on the ground of money hereafter to be advanced, and if an application were made to stop the money in the hands of Wells, in all probability the court would grant the rule. Here the plaintiff is responsible himself for the costs to his attorney, and the money, which is the consideration for the settlement, is stated to be in the hands of a person amenable to the court. I think, therefore, the rule should be made absolute.

HOLROYD, J. I am of opinion, that in this case the defendant is entitled to his discharge, satisfaction having been entered on the record. The plaintiff's attorney has no lien on the person of the defendant. As soon as *judgment is obtained, his power is at an end also.(a) It is true that he has a lien for his costs, and that the court will assist him to make the subject-matter recovered by the judgment available for that purpose; but they will go no further. The case of *Swain v. Senate* does not clash with the present decision; there the plaintiff's and defendant's bail having colluded to cheat the plaintiff's attorney, he proceeded to judgment, and issued a scire facias against the bail,

(a) [See 6 Johns. Rep. 53, *Crary et al. v. Turner*; 8 ib. 361, *Jackson v. Bartlett*; 10 ib. 220, *Kellogg v. Gilbert*.]

and, an application having been made to stay the proceedings, it was refused by the court. In that case, CHAMBRE, J., stated, that the settlement was void, because the acceptance of a smaller sum is not in law a satisfaction of a greater; and, therefore, the plaintiff's claim there was not legally barred. But here, satisfaction having been entered of record, there is a legal bar to the plaintiff's claim. And no process can issue for any thing merely due to the plaintiff's attorney after the claim of the plaintiff is legally at an end. The defendant is, therefore, entitled to be discharged.

BEST, J., concurred.

Rule absolute.

The KING v. The Inhabitants of MACHYNLETH and PENEGOES.

The court of quarter session cannot impose more than one fine for the non-repair of a bridge.

THE following order of sessions of the county of Montgomery was removed by certiorari into this court. "It is ordered, that the fine heretofore imposed by the court on the inhabitants of the township of Machynleth *and the parish of Penegoes, for not repairing Pontefelingerrig bridge, be, and the same is hereby increased by the sum of 200*l.*" Taunton obtained a rule nisi for quashing the order. It appeared from the affidavits that the defendants had been presented at the January sessions, 1818, for the non-repair of the bridge in question; to which presentment, they, at the same sessions, submitted, and a fine of 300*l.* was imposed and afterwards levied upon them. At the last Michaelmas session, 1820, the fine not having been sufficient, the order in question was made, imposing a second fine of 200*l.* The court, after hearing Campbell in support of the order of sessions, were of opinion, that the power of the sessions was at an end after the first fine, and that they had no jurisdiction to impose a second, and they referred to *Rex v. Inhabitants of Old Malton* (a) as an authority directly in point.

Order of sessions quashed.

(a) Holroyd, J., read the following MS. note of the case.

The KING v. The Inhabitants of the Parish of OLD MALTON. Yorkshire Summer Assizes, 9th August, 1794. Cor. LAWRENCE, J.

This was an indictment for not repairing a highway. The defendants had submitted to a fine, which had been apportioned between the parishioners and the trustees of the turnpike, (the road indicted being turnpike,) pursuant to the power given by the general turnpike act. Holroyd applied for a further fine, the whole fine being laid out on the way, and the way being still out of repair. Lawrence, J., doubted his power to give any further fine, on the ground that the court had given their judgment; and though Salk. 358, (see S. C. 6 Mod. 163,) states that the judgment is not at an end by the defendant's coming in and submitting to a fine, and that if the road is not put in repair, writs of distingas shall issue against the defendants till the road is completed: he held, that those writs are now the only remedy on the present indictment; that the fine is the punishment for the neglect and offence of which the defendants are indicted; and though the court may compel an actual repair, yet the punishment has been inflicted, and they cannot inflict a further punishment or fine; that the parish may be again indicted, and a fine imposed and apportioned on such indictment. Vide also 1 Hawk, c. 76, s. 94.

*The KING v. EDMONDS and Others.

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No challenge can be taken either to the array or to the polls, until a full jury have appeared; and therefore, where the challenges are taken previously, they are irregularly made. The disallowing of a challenge is not a ground for a new trial, but for a *venire de novo*; and every challenge must be propounded in such a way as that it may be put at the time upon the *misi prius* record, so that the adverse party may either demur, or counterplead, or deny the matter of challenge, in which last case only triers are to be appointed; and therefore, where the challenges were not put on the record, the defendants were held not to be in a condition to ask the opinion of this court, as a matter of right, upon their sufficiency. There can be no challenge to the array on the ground of unindifference in the master of the crown office, he being the officer of the court expressly appointed to nominate the jury.

'The only remedy in such a case is to apply to the court by motion to appoint some other officer to nominate the jury.'

The master of the crown office, in nominating the jury, selected the names of the jurors, and did not take them by chance from the freeholders' book. He also took those only whose names had the addition of "esquire" or of some higher degree; and included some persons, who were in the commission of the peace: *Held*, that in so doing he was perfectly right. He also included in his nomination some persons, who, as grand-jurymen, had found the indictment, and persisted in his opinion as to their sufficiency, unless the crown would consent to abandon them, which was done, and others were then substituted in their places: *Held*, that he was wrong in his opinion, but that there was no ground for presuming partiality.

The sheriff's officer had neglected to summon one of the 24 special jurymen returned on the pannel: *Held*, that this was no ground of challenge to the array for unindifferency on the part of the sheriff.

Held, also, that it is not competent to ask jurymen (whether special jurymen or talesmen) if they have not, previously to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground; but that such expressions must be proved by extrinsic evidence.

THIS was an indictment against the defendants for a conspiracy, upon which they were tried and found guilty at the last Summer assizes for the county of Warwick, before the lord chief baron. *Denman* in last Michaelmas term obtained a rule nisi for a new trial on the three following grounds: 1st, That the lord chief baron had refused to allow a challenge to the array, on the ground of the alleged unindifferency of the master of the crown office in nominating the special jury, and to appoint triers to try the facts alleged in support of that charge; 2dly, That he refused similarly to allow a challenge to the array, on the ground of the alleged unindifferency of the sheriff, and to appoint triers as before; 3dly, That he refused to permit questions to be put to the special jury-men, as to whether they had expressed themselves adversely to the defendants

*472] before the trial, although (the special jury *not being full) he did permit such questions to be put to the talesmen before they were sworn.

The motion was supported by affidavits, stating the different grounds of the complaint against the master of the crown office and the sheriff. Against this rule, cause was shown in Hilary term, upon affidavits, by the attorney-general and solicitor-general, with whom were *Vaughan*, Serjt., *Clarke*, *Reader*, *Littledale*, and *Balguy*. *Denman* and *Hill* were then heard in support of the rule. The whole facts and arguments on both sides are so fully stated by the court in giving judgment, that it has been deemed expedient to omit them here.

ABBOTT, C. J. This was an application to the court for a new trial. The cause (an indictment prosecuted by his majesty's attorney-general for a misdemeanor) came on to be tried by a special jury at the last Summer assizes at Warwick. The special jury was struck in or soon after Hilary term, 1820, and the record was carried down for trial at the Spring assizes in that year, but stood over until the Summer. The ground of the motion for a new trial was the refusal to allow certain challenges, supposed to have been duly taken at the trial: viz., a challenge to the array, and a challenge to some of the polls. The challenge to the array was made on two distinct grounds; first, the supposed unindifferency of the master of the crown office, by whom the special jury was nominated. Secondly, the supposed unindifferency of the sheriff. The supposed challenge to the polls was on the ground of opinions, supposed to have been expressed by the jurors hostile to the defendants, or some of them, and to

*473] their cause. Before I make any comments on these grounds, I will *observe that it is an established rule as to proceedings of this kind, that no challenge either to the array or to the polls can be taken, until a full jury shall have appeared, and if twelve of those named in the original pannel do not appear, a tales must be prayed, and the appearance of twelve obtained before any challenge be made. Upon this point, it will be sufficient to refer to the case of *Vicars v. Langham*, Hob. 235. In that case, the plaintiff first prayed a tales, and after the jury made full by tales, he challenged the whole pannel by exception to the sheriffs. The pannel was thereupon quashed, and a new jury

returned by the coroners, by which the cause was tried. A writ of error was brought, and the exception taken thereon was, that the plaintiff having first prayed a tales to the sheriffs and obtained it, was estopped to challenge the panel for exceptions to the sheriffs. But it was resolved, that there could be no challenge, neither to the panel nor to the poll, till first there were a full jury, so that the jury not appearing full, there was a necessity to have a tales, or else the challenge could not have been taken; and so the cause would have remained pro defectu juratorum, if the plaintiff had not prayed it, for the defendant could not, and so the judgment was affirmed. Now every one of the challenges taken at this trial, was taken and made before a full jury had appeared, and therefore made irregularly and out of season. It must further be observed, that the disallowing of a challenge is a ground not for a new trial, but for what is strictly and technically a *venire de novo*. The party complaining thereof applies to the court, not for the exercise of the sound and legal discretion of the judges, but for the benefit of an imperative rule of law, and the improper granting, *or the improper refusing of a challenge, is alike the foundation for a [*474] writ of error. Every challenge, either to the array or to the polls, ought to be propounded in such a way, that it may be put at the time upon the nisi prius record, and so particular were they in early times, when challenges were more in use, that it was made a question in 27 H. 8, 13 B. pl. 38, whether it was not a fatal defect to omit the concluding of it, with an "Et hoc paratus est verificare," and it was, because many precedents were shown without such a conclusion, and the justices did not choose to depart from the precedents, that it was held unnecessary. When a challenge is made, the adverse party may either demur (which brings into consideration the legal validity of the matter of challenge) or counter-plead, (by setting up some new matter consistent with the matter of challenge, to vacate and annul it as a ground of challenge,) or he may deny what is alleged for matter of challenge, and it is then, and then only that triers are to be appointed. The case before quoted from Hobart furnishes an instance of a writ of error, for the allowance of a challenge, which could not have been brought, unless the challenge had been returned on the postea: and in comparatively modern times there are two instances of the like nature. One in *Kynaston v. Mayor, &c. of Shrewsbury*, Andr. 85, and another in *Hesketh v. Braddock*, 3 Burr. 1847. In the latter case, the defendant challenged both the array and the polls; both challenges are entered upon the record. To the first (and probably to the second) the plaintiff demurred. The demurrer was allowed, the challenged overruled, and the cause tried. Error was brought thereon, and the judgment reversed, and upon the [*judgment of reversal, [*475] a writ of error was brought in the king's bench. The validity of the grounds of challenge was then again discussed, and the judgment of reversal was affirmed. The challenges, therefore, ought in this case to have been put upon the record, and the defendants are not in a condition in strictness to ask of the court an opinion upon their sufficiency. But notwithstanding this defect of form on the part of the defendants, the court has taken into consideration the validity of these challenges, and it is upon the ground of their invalidity, not on the defect of form, that we think the new trial ought to be refused. It has never been the practice of the court to grant a new trial, for the purpose of giving a party an opportunity of advancing an untenable objection, and I have noticed these points of irregularity, chiefly in answer to one of the topics that was addressed to us on the part of the defendants. It was said the defendants had a right to make their challenge, and to have it tried, whether they could sustain it by proof or not. To which I answer, if they had that right and would insist upon it, they should have pursued it rightly and regularly. Not having done so, their ground and their intended proof must be open to examination. And if upon examination, it appear that they could not have sustained their challenge, they are not entitled to a delay of justice, in order to give them

an opportunity of making an experiment in due form, which, in the opinion of the court, would be deficient in substance. I proceed, therefore, to examine the grounds and substance of the several challenges.

And first, as to the challenge of the array, that is, of the whole special jury *476] pannel, for the supposed unindifferency *of the master of the crown office. To sustain this charge of unindifferency, several matters of fact were mentioned, from some or all of which it was contended, that triers, if appointed, might infer that the officer was not indifferent. Of those matters, two were of a general nature, and two more especially addressed to the particular case in question. First, it was said, that the officer had selected the names of the jurors, and not taken them by some mode of mere hazard or chance from the freeholders' book. Secondly, that in this selection he had taken those names only which had the addition of Esquire. Thirdly, that among those selected and ultimately retained by him, some were gentlemen acting in the commission of the peace for the county. Fourthly, that the original nomination comprised several persons, who, as grand-jurymen, had found the present indictment; and that although this objection was pointed out to the master, as soon as it was discovered, that two or three gentlemen whom he had named were of that class, yet he persisted to retain those and to name others, until the solicitor of the treasury, being consulted, he consented to abandon them; upon which he struck them all out, and substituted other names in their places. Before the discussion of these points, a preliminary inquiry must be made; and if it shall turn out that there cannot, by law, be any challenge of the array at a trial, on any supposed ground of unindifferency in the officer of the court who has nominated a special jury, the consideration of these points will become immaterial, or material only in another view of the subject.

It cannot be, or at least it has not hitherto been ascertained, at what time the practice of appointing special *juries for trials at nisi prius first began. *477] It probably arose out of the practice of appointing juries for trials at the bar of the courts at Westminster, and was introduced for the better administration of justice, and for securing the nomination of jurors duly qualified in all respects for their important office. It certainly prevailed long before the statute 3 G. 2, c. 25, and was recognised and declared by that statute, which refers to the former practice. The whole matter is comprised in the fifteenth and two following sections of the statute. The fifteenth section begins by reciting, that some doubt had been conceived, touching the power of the courts at Westminster to appoint juries to be struck before the clerk of the crown, master of the office, prothonotaries, or other proper officer of the respective courts, for the trial of issues depending in the courts, without the consent of the prosecutor or parties concerned, unless such issues are to be tried at the bar of the same court, and then *declares* and enacts, that it shall be lawful for the courts, upon motion made on behalf of his majesty, or of any prosecutor or defendant, in any information or indictment for misdemeanor, &c., or plaintiff or defendant in any action or suit, and the courts are thereby authorized and required, upon such motion, to order and appoint a jury to be struck before the proper officer of the courts, in such manner as special juries have been and are usually struck in such courts, upon trials at bar had in the same courts; *which said jury, so struck as aforesaid, shall be the jury returned for the trial of the said issue.* The sixteenth section relates only to the costs. The seventeenth section enacts, that when a special jury shall be ordered to be struck, in any cause arising in *478] any city or county of a city, or town, the *sheriff or undersheriff shall be ordered, by the rule, to bring before the proper officer the books or lists of persons qualified to serve on juries within the same, in like manner as the freeholders' book hath been usually ordered to be brought, in order to the striking of juries for trials at bar, in causes arising in counties at large, and the jury shall be taken and struck out of such books or lists. Upon this statute it

may be observed, first, that there is no provision as to the mode of taking and striking the special jury; but that matter is left to the ordinary practice used in cases of trials at bar. 2dly, That there is a positive enactment, that the jury so struck shall be the jury returned for the trial of the issue. And, 3dly, That although the statute contains a provision for the attendance of the sheriff of the county of a city or town, it contains none as to the attendance of the sheriff of a county at large; leaving that to be enforced according to antecedent practice, which may well be supposed to have been more perfectly established in the cases of counties at large, than in smaller districts, by reason of its more frequent occurrence. This statute, therefore, must necessarily be understood and construed, in many respects, by reference to the antecedent and existing practice of the courts. And, notwithstanding all the learning and research that have been bestowed on the present case, on the part of the defendants, not one solitary instance has been found of an offer to challenge the array on the supposed ground of unindifference in the officer of the court by whom a jury had been nominated for any trial, either at bar, or at nisi prius, either before or since the statute; although there must have been many occasions, on which it may reasonably *be presumed, that such a step would have been taken, if it [*479 had been thought maintainable.

In considering the causes of the absence of any such attempt in former times, it will be proper to advert to the circumstances under which a challenge to the array is made in other cases. Such a challenge is always grounded upon some matter personal to the officer by whom the jury has been summoned, and their names arrayed or placed in order upon the parchment or pannel whereon they are returned, in writing, to the court. Upon trials for felony, this pannel is not in any manner published or made known, until the sitting of the court, at which the trial takes place; and, therefore, that sitting necessarily furnishes the first opportunity of making any objection to it. Upon other trials, and in the superior courts, there have always, or at least almost universally, been two successive processes to enforce the attendance of the jury. First, a venire returnable in the court above, at the place of its sitting, and in some day in term. To this process, the sheriff formerly made an actual return of the names of jurors as summoned, but the jurors themselves did not appear. This, therefore, was followed by a second process, more compulsory in its nature, requiring their attendance in the court, in like manner, on some other day. This process is still issued in its primitive and unqualified form for trials at bar; but, for trials at nisi prius, it contains a clause, inserted by virtue of the ancient statute of nisi prius, qualifying the command for their attendance in the court above, in case the justices of assize shall, before the day appointed, come into the county at some day and place particularly mentioned. Upon this view of the process, and advertting to that established rule *which postpones a challenge of the array until the [*480 actual appearance of a full jury, it is manifest that no party has an opportunity of making such a challenge until the cause has been actually called on for trial. This, therefore, being the first opportunity, is, in the ordinary course, the proper time and season for such a challenge, where the jury have been impanelled and chosen in the usual way by the sheriff. But as the effect of such a challenge, if allowed, would often be to delay the trial, it became usual for a plaintiff, who anticipated that such a challenge might be effectually made, to apply to the court, and suggest the objection to the sheriff, and, if this was not denied, the court directed its process to the coroners of the county instead of the sheriff. And, in case the coroners also were liable to objection, and this was suggested to the court, then the court appointed certain persons of its own nomination, called elizors, to whom the process should be directed. And this course of practice is not altogether obsolete at the present time. The coroners, like the sheriff, are general officers, and not the particular officers of the court; amenable, indeed, to the court for misconduct, but acting officially under the

general authority of the law, and not, like elizors, under the special authority of the court. The array, therefore, may be challenged for causes of personal objection to the coroners. *But where the process has been directed to elizors, there can be no challenge of the array*, Co. Litt. 158 a; because, saith the author, they were appointed by the court; but he may have his challenge to the polls. So, likewise, on a writ of right, whereon the sheriff returns to the court four knights, by whom, after being sworn for this purpose, twelve others are chosen and named in *the presence of the parties, to constitute with the ^{*481]} same knights the grand assize, or trying jury, consisting of sixteen persons, there cannot, after the pannel is returned by the four, be any challenge, either of the pannel or of the polls; though the twelve, before any assent or return of the pannel, may be challenged before the four knights electors. Co. Litt. 294. See also Booth's Real Actions, p. 97 and 102, 7 Hen. 4, fo. 20. Now the nomination of a special jury by the known and general officer of the court, whether the clerk of the crown or master of the office, or otherwise, is precisely analogous to a nomination by elizors specially appointed by the court for the particular purpose; and, as the array cannot be challenged in the latter case, I am unable to discover any satisfactory reason for saying, in the absence of all practice and authority, that it may be challenged in the former. The reason for disallowing it holds equally in both cases; *the court may be applied to*. If there be any reasonable personal objection, known beforehand, the court will, upon proper application, order the nomination to be made by another officer: if any reasonable objection arises from the conduct of the officer on the particular occasion, the court, having power over its own rule, at least until every thing shall have been completed under it, can reform and correct, and, if necessary, make a new rule for nomination by another officer, or abrogate the rule entirely, and leave the nomination to the sheriff. If the application be not made, or be refused by the court as unreasonable, it may well be supposed that no reasonable objection exists, especially when it is considered that the party has the power of striking out twelve names.

^{*482]} Another reason against allowing such a challenge is, the great inconvenience that would ensue, and the almost utter impossibility of inquiring into the matter satisfactorily at nisi prius. If such a challenge can be allowed in one case, it must be allowed in all, criminal and civil, for the prosecutor and for the defendant. And such challenges may be used as an instrument of delay or vexation at every assizes throughout the kingdom, and must be tried in the absence of the person by whom the pannel has been formed, and consequently without any opportunity of answer or explanation; whereas the sheriff and the coroners are bound by the duty of their office to attend at the assizes, and in fact almost invariably do so.

I have already mentioned, that the practice of nominating jurors under a rule of the courts at Westminster, is antecedent to the statute, and confirmed by it; and I must here again notice the concluding words of the 15th section, "which said jury, so struck, shall be the jury returned for trial of the issue." I cannot reconcile that expression to the supposition, that any idea was entertained by the legislature that the jury so struck and returned, that is, the whole pannel and the whole proceeding, should be set aside at nisi prius, at least upon any challenge to the favour. In the case of *The King v. Johnson*, the challenge was on an objection to the sheriff; and the answer, that he was acting under a rule of the court, could not be satisfactorily given at nisi prius, because the other party was not prepared with the rule of court. This matter appears to have been introduced by way of counterplea to the challenge; and there was a special demurrer to the counterplea, assigning, among other causes, the non-production of the *rule. And, according to the account of the case in the ^{*483]} Crown Circuit Companion, pp. 105, 6, of the eighth edition, the judges of Chester held the counterplea ill, because the court there could not take notice

of the rule of court; and Lord HARDWICK afterwards said the judges had done right, because the rule of the court could not be taken notice of. And this appears to be a more satisfactory reason than that which is mentioned in the report 2 Strange, 1000, (which reason, however, does not apply to the present point,) namely, that the sheriff would have the ordering of the names on the pannel. It may be further observed, in support of the reason mentioned in the Crown Circuit Companion, that the trial being in Cheshire, the jury process did not issue from this court; but the record was sent by mittimus to the chamberlain of the county palatine, and the jury process issued from the court of great sessions; and the case was tried at the bar of the court there, in the usual course.

One other instance only of challenge of the array of a jury nominated under a rule of court was mentioned, viz., *The King v. Burridge*, 1 Str. 593. This was before the statute; and it appears to have been thought that the rule of court could not dispense with the rule of law as to hundredors. It is unnecessary to give any decisive opinion on that point at present; I will therefore only say, that if it be law, great inconvenience may ensue.

We are all, therefore, of opinion, that a challenge to the array cannot be taken at nisi prius for the supposed unindifference of the officer, by whom the jury was nominated under a rule of court, according to the statute. Indeed, it stands as a matter of doubt in the books, whether any challenge to the array, which operates *only as a challenge to the favour, like the present, can be taken against the crown. This being doubtful, I place no reliance upon it. And as these defendants had two entire terms in which they might have applied to this court, and forbore to do so, unless their objections could prevail as grounds of challenge, they must be of a very plain and cogent nature to induce the court to listen to them at this stage of the proceedings for the purposes of a new trial, which would be contrary to all rules and analogy of practice. So that it is not absolutely necessary to notice or discuss the particular grounds alleged. But it will be more satisfactory to do so; and I will therefore, for the purpose of considering them, suppose that the array may, in a case like the present, be challenged for alleged unindifference in the officer who nominated the jury.

The first ground was, that the officer selected the names, and did not take them by some mode of chance or hazard. Now such a mode would be contrary to all precedent and example. Jurymen have always been named by the discretion of some person; of the sheriff, the coroners, or elizors. In special juries, before the statute, they were named by an officer of the courts; the statute recognises and confirms the practice in general terms. It is impossible to suppose, that the legislature passed a statute to confirm the practice, without knowing how that practice was conducted; and not less impossible to suppose, that an act of parliament, evidently passed for the purpose of obtaining jurors of some superior qualification, should be carried into effect by the adoption of a mode that would leave the qualification absolutely to chance. 2dly, The second ground was, that the officer nominated those persons *only whose names had the addition of esquire, or of some higher degree. On a [485] charge of partiality, it is material to consider, whether the act be according to usage and precedent, or a departure from them. And it is well ascertained, that the nomination of gentlemen of this class is according to the general and ancient usage of all the courts, so that it affords not the slightest evidence of partiality in the particular case. Something like ridicule was attempted to be cast upon this addition of esquire in the freeholders' book, and we were told, that it is the constable who makes the esquire. But how is it that the constable acts in this case under the statute that was referred to? He selects from the rate-book of his parish, the names of persons qualified to serve on juries, and affixes the list on the church-door in the first instance, and afteryards returns it to the

quarter sessions, and we must therefore suppose, that he gives to each individual the addition and description by which he is usually known and addressed in his own neighbourhood. But, suppose the constable to give this addition to persons of inferior rank, and to withhold it from those of superior, he may indeed, by so doing, deceive the officer of the court in some respect, but he will do nothing of which these defendants can complain without inconsistency, because they say, they ought not to be tried by persons above the common degree, and this is the substance of their complaint against the nomination of esquires. Nor is partiality in any degree evidenced by the particular circumstance on which so much stress was laid, namely, the small number of persons having the addition of esquire in the freeholder's book of Warwickshire ; indeed, that circumstance has a contrary tendency, because by narrowing *the choice, it shows that the officer looked to a class only, according to the usual practice, and not to the personal character of particular individuals. If he had looked at the latter, he would naturally have taken to himself a larger scope, as furnishing more numerous objects for his selection. It is the very object of a special jury to obtain the return of persons of a somewhat higher station in society, than those who are ordinarily summoned to attend as jurymen at nisi prius. And a similar practice has long prevailed, even in the execution of writs of inquiry of damages, before the sheriff ; wherein a party obtains, on application, a rule of the court, in obedience to which, the sheriff summons persons of a somewhat higher class, than those by whom he is ordinarily attended. This object is accomplished in the mode open to the smallest portion of suspicion or objection, by adverting to the addition placed against the name. And we have no doubt, that the officer has the power of nomination, and of nominating only from the higher classes according to the ancient practice, and that he acts wisely in doing so, unless there be some special reason for adopting a new and different course. In the present instance, we have the affidavit of the officer, stating, that, to the best of his knowledge and belief, he knew not even by name more than two of the persons whose names he put upon the list ; that he had not, to the best of his knowledge, ever seen more than one of them, and that one only once ; and further, that he knew nothing of or concerning the connexions or principles of any of them, by which he was influenced in his nomination ; and that he nominated each of them solely, because, in looking indiscriminately over the books, in the manner that he has mentioned, he met *with his name among that class of persons, from which, according to his opinion, the special jurors have been usually struck.

*487] The third ground of complaint was, that the officer named several gentlemen acting under the commission of the peace for the county. It was said that those gentlemen must be supposed not to be unindifferent between the crown and the defendants, upon this, which was termed a political prosecution, because they hold their office at the pleasure of the crown. I do not exactly know what is meant by a political prosecution ; the present, as I collect from the indictment, is a prosecution for a high misdemeanor against the public peace, and the constitution and rights of one branch, at least, of the legislature of the country. It is true, indeed, that justices of the peace hold their office at the pleasure of the crown, but they hold a laborious and burthensome, and not a profitable office ; and it is really a gross calumny upon a class of persons, to whom the nation is most peculiarly indebted for valuable and gratuitous services, to suppose that they will not act impartially between the king and his people. If gentlemen of this description should be returned by the sheriff, no challenge could be taken to them individually, as a challenge to the polls, on the ground of their office ; it has been the constant practice, to name some gentlemen of this class on special juries, or rather no one has ever thought of omitting them on the nomination. Some of them are constantly returned by the sheriff as grand-jurymen ; and no man, who wishes well to the country, can wish to see them excluded as

a class, and by reason of their office, from any portion of the administration *of justice, wherein they have been accustomed to take a part.

The last ground of complaint on this head, was the original nomination [*488] of some of the gentlemen who had been named on the grand jury, by which this indictment was found. The master of the crown office has informed us, upon his oath, that he did not consider this fact to form a valid objection to their nomination. And taking this, as we are bound to take it, not merely from the particular oath, but from the well-known and general honour and integrity of that officer, to be true, it is impossible to say, that, although he might be mistaken in his opinion, he did not act honestly in abiding by it, until the solicitor of the treasury consented to waive the nomination. The nomination was waived and abandoned, and in fact, every name of this description was struck out of the list of forty-eight, and other names substituted, before the list was delivered out to the parties for reduction; so that the defendants sustained no possible prejudice or inconvenience from the intended nomination.

And here I will observe, that this circumstance affords an instance of the utility of the presence of the parties at the time of the nomination of the forty-eight, which we were told would be useless, if the officer might name at his pleasure. For if the parties had not been present, it is probable that some names of this description might have stood among the forty-eight, either from ignorance of the fact, or from the mistaken opinion of want of objection to them. The presence of the parties may enable them, on many occasions, to give useful hints which the officer will adopt, as for instance, the death, absence, or ill health, of a person named in the freeholders' book.

*The only remaining ground of challenge of the array was, the supposed unindifferency of the sheriff; and this was to be manifested by [*489] the supposed omission to summon one of the gentlemen named in the pannel of the special jury. This was treated as a challenge to the favour for unindifferency. It could not be a ground of principal challenge, according to any authority. Considering it as evidence of partiality, let us see how the fact stands. The undersheriff directed the summons of this gentleman, at the same time and manner as of the others named in the pannel. The inferior officer, whose duty it was to serve the summons, sent it in a very negligent and blameable manner, together with a summons in some other causes, by a carrier or newsman, instead of taking it himself. This was done without the privity of the high-sheriff, or his undersheriff. How, then, can it lead to any inference of partiality in the mind of either of those officers? But, further, how were the defendants prejudiced by it? Mr. Peach, the gentleman in question, appears, by the affidavits before us, to have been long in an infirm state of health; to have been summoned, either as a grand or special juryman, to every assizes at Warwick, for the last eight years, and never once to have attended; and to have been summoned to this very assize, in due time, on some other cause, but not to have obeyed that summons. So that, upon the whole, we must conclude, that, at whatever time or manner summoned for the present trial, this gentleman would have availed himself of that excuse for absence which the state of his health afforded. It is, therefore, really absurd, to treat this neglect of the inferior officer, as furnishing evidence of partiality in the sheriff to sustain a challenge of the array on that ground, or as an inducement to this court to grant a new trial.

*The last ground of the motion for a new trial, was the refusal of [*490] what has been called a challenge to the polls, in the case of the special jurymen. This challenge was made on the ground of opinions supposed to have been expressed by those gentlemen hostile to the defendants and their cause. There was no offer to prove such an expression, by any extrinsic evidence, but it was proposed to obtain the proof, by questions put to the jurymen themselves. The lord chief baron refused to allow such questions to be an-

swered ; and, in our opinion, he was right in this refusal. It is true, indeed, that he permitted similar questions to be answered by the talesmen ; but in so doing, we think he acted under a mistake. It does not appear, distinctly, in what precise form the question was propounded ; but, in order to make the answer available to any purpose, if it could have been received, it must have been calculated to show an expression of hostility to the defendants, or some of them, a preconceived opinion of their personal guilt, or a determination to find them guilty ; any thing short of this would have been altogether irrelevant. The language of Mr. Serjeant *Hawkins* upon this subject, lib. 2, c. 43, s. 28, is, that if the juryman " hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like, yet if it shall appear that the juror hath made such declaration from his knowledge of the cause, and not out of any ill-will to the party, it is no cause of challenge." So that, in the opinion of this learned writer, the declaration of a juryman will not be a good cause of challenge, unless it be made in terms or under circumstances denoting an ill intention towards the party challenging. A knowledge of certain facts and an opinion that those facts constitute a crime, are certainly no grounds of challenge, for it is *clearly settled, that a juryman cannot be challenged by reason of his having pronounced a verdict of guilty against another person charged by the same indictment.(a) In *Brook, Challenge*, pl. 90, it is thus stated : It is a good callenge, to say that a juryman has reported, that if he be impannelled, he will pass for the plaintiff ; and 21 Hen. 7, 29, is referred to. *Ibid. Challenge*, 55. Another juryman was challenged for favour, in a suit of replevin ; *BABINGTON* : if he has said twenty times that he will pass with the one party for the knowledge that he has of the matter and of the truth, he is indifferent ; but if he has said so for any affection of the party, he is favourable, and he charged the triers accordingly ; and 7 Hen. 6, fo. 25, is cited. In *Fitz. Chall.* 22, the opinion of *BABINGTON* is thus given : " If he will pass for one party, whether the matter be true or false, he is favourable ; so, if he has said that he will pass for one party, if it be for affection that he has to the person, and not for the truth of the matter, he is favourable ; but if it be for the truth of the matter that he has knowledge of it, he is not favourable ; wherefore you will inquire according to what I have said." The charge of *BABINGTON* to the triers, as given in the *Year-book*, 7 Hen. 6, fo. 25, is this. Addressing himself to the triers, he says : " If, whether the matter be true or false, he will pass for the one or the other, in that case he is favourable ; but if a man has said twenty times that he will pass for the one or the other, you will inquire, on your oaths, whether the cause be for affection that he has to the party, or for the knowledge he has of the matter in issue ; if for affection that he *has to the party, then he is favourable, but otherwise not ; and if he has more affection to one than to the other ; but if he has a full knowledge of the matter in issue, if he be sworn, he will speak the truth, notwithstanding the affection he has for the party, then he is not favourable." Again, Bro. pl. 90. By *Frowick, J.* : " Not sufficient of freehold is a good challenge ; and upon this the party himself shall be sworn, whether he has sufficient or not." In the 49 Edw. 3, fo. 1, it appears, that some of the jurors were challenged, for that they had declared the right of one party or of the other beforehand, or given their verdict beforehand, and some for that they were of counsel with one party or the other, and of their fees : and mesmes les persons, that is the persons themselves, were sworn to speak the truth, where the challenge did not go to their reproof or shame ; but those who were challenged, for that they had taken of the party, or procured without taking, were not sworn on the *voir dire* to give evidence to the triers.

These ancient authorities show, that expressions used by a juryman are not

(a) See *P. Cook's case*, 13 St. Tr. 313, and 7th resolution in the case of the *Regicides*, 5 St. Tr. 985, and *Cranburne's case*, 13 St. Tr. 221, Howell's edition.

a cause of challenge, unless they are to be referred to something of personal ill-will towards the party challenging; and also, that the juryman himself is not to be sworn, where the cause of challenge tends to his dishonour; and to be sure, it is a very dishonourable thing for a man to express ill-will towards a person accused of a crime, in regard to the matter of his accusation. And accordingly, we find it established in later times, namely, at the trial of *Peter Cook*, 13 St. Tr. 334, Howell, in the eighth of King William the Third, that such questions are not to be put to the juror himself. So *that all the [*493] authority in the law on this head is against the defendants, and shows, that the refusal of the lord chief baron to allow the proposed questions to be answered by the special jurymen, was most proper and agreeable to law. Upon the whole matter, we all think that the rule for a new trial must be discharged.

Rule discharged.(a) (b)

(a) In *P. Cook's* case, 13 St. Tr. 339, the prisoner having asked one of the petty jury on the voir dire, whether he were one of the grand jury that found the bill, Treby, C. J., said it was a very proper question; "for an indictor ought not to be a trier."

(b) [See 3 Dallas, 515, *U. States v. Fries.*]

NEWINGTON v. KEEYS.

Bail above are not sureties or persons liable for the debt of a bankrupt within 49 G. 3, c. 121, s. 8.

ASSUMPSIT for money lent and advanced, money paid, money had and received, and upon an account stated. Plea: as to all the counts, except the count for money paid, the general issue, and as to that count, defendant pleaded, that, on the 27th January, 1814, at, &c., he became a bankrupt, and that before the commencement of the suit, and after the 49 G. 3, to wit, on the day and year aforesaid, a commission issued against him, upon which he was duly declared a bankrupt. And that, on the 1st April, 1814, he obtained his certificate, which was allowed by the chancellor on the 13th February, 1815. The plea then stated, that before the issuing of the commission, and before the committing of any act of bankruptcy, the plaintiff became bail for the defendant in a certain action of *Jones and Others v. Keey's*, and afterwards, to wit, in Trinity term, 1813, entered into a recognisance in the court of king's bench, that, "if the said defendant *should happen to be convicted in the said plea, then, that all [*494] such damages as should be adjudged unto the said Jones and others, in that behalf, should be made of his lands and chattels, and levied to the use of the said Jones and others, if it should happen that the said defendant should not pay the said damages, or render himself on that occasion." The plea then stated, that, in Hilary term, 1814, judgment was recovered against the defendant in the action, *Jones and Others v. Keey's*, with 147l. damages, and that the defendant did not pay those damages, or render himself on that occasion, according to the form and effect of the said recognisance. And that thereupon such further proceedings were had, that, after the issuing of the said commission, and before the defendant obtained his certificate, to wit, on 6th November, 1814, the plaintiff, as one of such bail, became, and was, according to the course and practice of the said court, obliged to pay, and actually did pay the sum of money, in the said second count mentioned, to the said Jones and others, for, and on account of the said damages. Replication, that the said Jones and others did not obtain judgment in their action, until after the time of the issuing the commission of bankruptcy against the defendant. Demurrer and joinder.

Parke in support of the demurrer. The question here is, whether bail above be a surety within 49 G. 3, c. 121, s. 8. By that section, all sureties, or persons liable for any debt of the bankrupt may prove under the commission. If they can prove, the debt is of course barred by the certificate. Now, that statute being a remedial law, ought to have a liberal construction given to it, and so it

*495] was laid down by the court in *Wood v. Dodgson*, 2 M. & S. 195. Here the bail are substantially sureties for the debt, and they have been compelled to pay it. The bankrupt's estate has thereby been released from any claim by Jones and others on it. Accommodation acceptors or drawers have been held to be sureties within this clause. In *Hewes v. Mott*, 6 Taunt. 329, 2 Marsh. 192, the court of common pleas held bail to the sheriff not within the act. But there the bail-bond is entered into with the sheriff. Here the recognisance is entered into with the original creditors.

Tindal, contrà. Judgment not having been obtained when the commission issued, it is impossible to say for what debt the bail were then liable. How can it be ascertained, whether they will ever be liable. The principal may render in their discharge. He was then stopped by the court.

ABBOTT, C. J. The recognisance of bail is in the alternative, to pay the damages in case the principal does not pay them or render himself. In cases which have been decided to fall within this clause, the parties could only pay the debt, in case the principal did not do so, and that is the material distinction. If the legislature intended to include bail, it would have been easy to have done so, by only adding the words, "or bail," which would have removed all difficulty. In the absence of such words, I am of opinion, that the bail in this case are not sureties within the meaning of the 49 G. 3, c. 121, s. 8. There must, therefore, be judgment for the plaintiff.

Judgment for the plaintiff.

*496]

*The KING v. The Mayor of MONMOUTH.

A mandamus to the mayor of M. to convene a meeting, to proceed to an election, in order to fill up five vacancies in a select body, consisting of fifteen chief burgesses. Return by him, after stating objections to the titles of several of the remaining burgesses, that there were not within the borough eight legally elected chief burgesses, by whom the election of others could be made, and that, for the several reasons before mentioned, he could not proceed to such election: Held insufficient return, and peremptory mandamus awarded.

THIS was a mandamus to the mayor of the borough of Monmouth, reciting a charter of the 3 Jac. 1, granting to the mayor, bailiffs, and commonalty of the said borough and their successors, "that there should for the future be fifteen of the most discreet of the burgesses to be named chief burgesses, and to form the common council, for the good order and government of the said borough; and that whosoever it should happen that any one or more of the aforesaid chief burgesses of the said borough should die or be amoved from their offices, or the said chief burgesses, or any one of them, not well conducting themselves, should, for that cause, or any other reasonable cause, become amovable, that then it should be lawful for the aforesaid mayor and chief burgesses of the borough aforesaid for the time being, then surviving or remaining, or the major part of them, (of whom the mayor of the borough aforesaid to be one,) one other or others of the burgesses of the borough aforesaid, into the place or places of the said chief burgess or burgesses so happening to die or be amoved, to elect, nominate, and appoint, to supply the number of the fifteen chief burgesses of the borough aforesaid." The mandamus then stated, that the offices of five of the aforesaid chief burgesses of the said borough were vacant, and commanded the mayor, in the usual manner, to convene a meeting to supply the vacancies. The return of the mayor, after stating objections to the titles of several persons who claimed to be chief burgesses of the borough, concluded as follows:

*497] "And I do hereby further certify and return, that there are not now, within the said borough, eight legally elected chief burgesses of the number of the fifteen chief burgesses of the said borough, by whom, or by a majority of whom, the election of chief burgesses of the said borough can be made, as by the within-recited charter is directed; and, lastly, I do hereby fur-

ther certify and return, that, for the several reasons before mentioned, I cannot proceed to such election of chief burgesses of the said borough, and to do such other things as by the within writ I am commanded."

Campbell, in support of the return, allowed that some of the reasons it contained for not proceeding to the election were untenable; but contended it was sufficient, if enough appeared on the face of the return to show that an election could not legally have taken place, *Rex v. Archbishop of York*, 6 T. R. 493. And here, according to *Rex v. Bellringer*, 4 T. R. 810, an election of capital burgesses in this borough could not take place, except by a majority of the whole body, as originally formed; and the mayor has expressly made a return, on which a traverse may be taken, that there are not now eight chief burgesses by whom the election could be made. But

The court said, that, supposing a majority of the whole body were requisite to make the election, the return was bad; for the mayor says there are not, within the borough, eight legally elected chief burgesses. Now, although there may not be eight who were legally elected, there may be some who were not legally elected, but whose titles are now unimpeachable from ^{*lapse of} time, so as to leave a majority of the whole body qualified to proceed to [*498 the election.

Return quashed, and peremptory mandamus to issue.

W. E. Taunton was to have argued on the other side.

The KING v. The Inhabitants of LEEDS.

By stat. 59 G. 3, c. 12, s. 33, the wife and eight unemancipated children of a Scotchman, who has not acquired any settlement in England, must, if chargeable, be sent by a pass along with the husband to Scotland, and cannot be removed to the maiden settlement of the wife.

Two justices, by their order, removed Hannah, the wife of Thomas Robinson, and Thomas, Hannah, and Elizabeth, her children, from the township of Leeds to the township of Almondbury, both in the West Riding of the county of York. The sessions, upon appeal, discharged the order, subject to the opinion of this court upon the following case. Thomas Robinson, the husband of Hannah Robinson, was a Scotchman, residing at Leeds with his family, and had not acquired any settlement in England. Not being able to maintain his wife and children, they were obliged to apply for relief to the township of Leeds, and were actually chargeable to that township at the time of granting the order of removal. Under these circumstances, he consented that his wife and children should be removed to Almondbury, which was the place of his wife's maiden settlement. It was objected, by the counsel for the appellants, that by the statute 59 G. 3, c. 12, s. 33, the wife and family (the children not having gained any settlement in their own right) could not be sent by an order of removal to her maiden settlement, but ought to be sent by a pass under that act, along with the husband, to Scotland. The sessions were of that opinion, and accordingly discharged the order of removal.

**E. Alderson*, in support of the order of sessions. The right of removal to the wife's maiden settlement, when the husband is residing with her, is only to be allowed in cases where he is himself irremovable, because it ought to go no further than necessity absolutely requires, it being contrary to sound policy to permit such separations to take place. Here the act of parliament, 59 G. 3, c. 12, s. 33, has expressly made him removable to Scotland, and it would follow, therefore, from that circumstance alone, that his wife and family must go with him, and that they are not removable any longer, even with consent, to her maiden settlement. But here the act of parliament goes much further, for the wife and family are expressly mentioned in it. It provides, that, upon complaint of the churchwardens, that a person born in Scotland hath be-

come chargeable, by himself or his family, the justices are to cause him to come before them, and to examine him as to the place of his birth or last legal settlement, and whether he or any of his children hath or have gained any settlement in England. Now the object of this is simply to ascertain whether he has any settlement to which he may be removed, and whether any of his children have gained one; because, if so, they are not part of his family. Then, if they find that he has not gained any settlement in England, the act says they shall remove him, his wife, and such of his children as have not gained a settlement, (in other words, him and his family,) by a pass into Scotland. For the gaining a settlement is one of the modes of emancipation; and the act, therefore, when it uses that expression, means only all unemancipated children. It is to be observed, that no mention is made throughout of any inquiry into the wife's *500] settlement, which would not have been omitted, if the removal of "her and the family to such place were in the contemplation of the legislature. If this construction be not adopted, great inconvenience may follow. A man, after consenting to the removal of his wife to a neighbouring parish, may then be sent off to Scotland, and so separated altogether. And the parish to which the removal of the wife and family takes place, not having the husband present, cannot put the act in force. So that, as to them, the act would be altogether repealed.

Scarlett and Bolland, contrà. It was settled in *Rex v. Eltham*, 5 East, 113, that the wife and children may, where the husband has gained no settlement in England, be removed by his consent to her maiden settlement. And the act 59 G. 3, c. 12, s. 33, is not imperative on the magistrates, but gives them a discretion as to whether they will remove the wife and children, with the husband's consent, to her maiden settlement, or send them, with him, into Scotland. And where so serious and important a power as that of sending a whole family out of the kingdom, is to be given, it is fit that there should be a discretionary power vested in the magistrates, to prevent the hardships which otherwise would occur. The words are only, that the said justices "shall, and they are hereby empowered;" which are not imperative. Here the children have settlements by birth in England. And, therefore, they, at all events, cannot be removed. Besides, it would be very hard, if a young man, born in England, and perhaps of age, but still residing in his father's family, might, because he was unemancipated, be sent off into Scotland or Ireland, where he might be *501] altogether destitute of the means of support. *The court will not adopt a construction of the act of parliament, which would compel magistrates to inflict such hardships upon individuals.

ABBOTT, C. J. This question arises out of the compulsory power formerly vested in justices of peace, of removing a wife from her husband, by consent: and it is one, and that not the smallest of the evils attendant on the poor-laws, that cases should have arisen under them, in which this court has held, that such a removal, amounting to a temporary divorce, might lawfully be made. It is to be observed, however, that in *Rex v. Eltham* there was the consent of both husband and wife to the separation. I am very glad that we are relieved by this act of parliament from the necessity of considering those cases. I think it is impossible to read the words of the thirty-third clause without seeing that the magistrates have now the power, in cases like the present, of sending the husband, together with his wife and family, by a pass to Scotland; and, having this power, I am of opinion that they cannot now remove the wife and family to her maiden settlement, so as to separate her from her husband. I think, therefore, that the order of sessions was right, and ought to be confirmed.

BAYLEY, J. I am of the same opinion. It is against public policy and good morals, to permit the separation of a husband and wife, even with their consent. This question, however, turns on the construction of 59 G. 3, c. 12, s. 33, which enacts, that it shall and may be lawful for the magistrates, and they are thereby required, in certain specified cases, to cause persons born in Scotland, &c., to

be brought before them. Now these *are words of compulsion on the magistrates to institute proceedings in cases like the present. The act [502 then provides, that the justices shall inquire into the settlement of the head of the family and his or her children, in order, as it seems to me, to ascertain whether any of those children have been emancipated. It then enacts, that such justices shall and are thereby empowered to cause such poor person, his wife, and such of his children as have not gained a settlement in England, to be removed by a pass to Scotland. Now it is to be observed, that the wife is thus, for the first time, introduced in the latter part of this clause, which is perfectly silent in the prior part of it, as to any inquiry to be made by the justices respecting her settlement. I think, therefore, that the magistrates have no discretion given to them of removing the wife to her maiden settlement, and thereby of separating her and her family from the husband. If the magistrates remove at all, they must remove the whole family together to Scotland, under the provisions of this act of parliament.

HOLROYD, J. I am of the same opinion. The words of this clause are imperative on the magistrates, in case they make any order, to remove the whole family to Scotland, and not, as they have done here, to remove the wife and family to the place of her maiden settlement. By the act, if the husband becomes chargeable by himself, or his family, he may be removed; and, it seems to me, that it is altogether immaterial, provided the head of the family be born in Scotland, whether the children be born in England or not. The only exception is as to those children who have gained settlements in England in their own right. Then, as a power is *now given to remove the husband, the [503 wife must be removed with him; for the power of removing her to her maiden settlement was allowed to exist only from the necessity of the case, and must cease with it. It seems to me, that we cannot narrow the construction of the words of this statute, unless, in so doing, we clearly saw that we should further the intention of the legislature. And as I do not think that their intention was to prevent the removal of the whole family together, I am of opinion that the decision of the sessions was right.

BEST, J. If the point decided in *Rex v. Eltham* were to occur again, I think it would perhaps be worth considering whether that decision could be supported. It is, however, not necessary to determine that question now, because I am clearly of opinion, that, under the clause of this act of parliament, it is imperative on the magistrates to remove the whole family to Scotland. It seems to me, that clearer terms could not have been used. For the act expressly says, "that the magistrates shall, and they are hereby empowered, to remove such poor person, his wife, and such of his children as have not gained a settlement, to the place of his birth or last legal settlement." The statute could not, therefore, mean to leave a discretion in the magistrates as to whether they would exercise this power or not. And by adopting this construction, we shall, as it seems to me, further the object of the statute, which was to remove the inconvenience which existed from idle and improvident persons coming to this country, and remaining here irremovable with their wives and families. Any other construction would produce great inconvenience. It is quite clear, that the head of the family may be removed; *and if he should be removed, after the separation from his family, the wife and children would, in all probability, [504 remain permanently chargeable.

Order of sessions confirmed.

The KING v. The Inhabitants of MANCHESTER.

A room in a parish workhouse, licensed pursuant to 13 G. 3, c. 82, and appropriated to the reception of and used for the purpose of delivery of pregnant women resident within the parish, whether settled there or elsewhere, and the expense of which room was defrayed, in common with the general expenses of the workhouse, out of the parish rates, is not an hospital or place within the 13 G. 3, c. 82, s. 3.

Two justices, by their order, removed Margaret, the wife of James Crocker,

and her two children, Ellen, aged eight years, and James, aged six weeks, from the township of Manchester, to the parish of St. Andrews, Canterbury. The sessions, upon appeal, confirmed the order as to Margaret Crocker and Ellen, her daughter, and quashed it as far as it respected James, the son ; subject, as to the settlement of the said James, to the opinion of the court of king's bench, on the following case. In the Manchester workhouse, there is a room for which a license has been obtained, as for an hospital, or place for the reception of lying-in women. This room has been duly licensed, pursuant to the provisions of the statute 13 Geo. 3, c. 82, provided, that, under the circumstances, it is such a place as can be duly licensed within the meaning of that act. The room is appropriated, by the officers of the town of Manchester, to the reception of women resident within the township, but settled elsewhere, and pregnant with children likely to be born bastards, and also to the reception of pregnant women chargeable to the township, and settled in Manchester ; and in some few instances, pregnant women *have been received from other districts, [505] upon a compensation paid to the overseers of Manchester by the overseers of the place in which such pregnant women were resident, in respect of the accommodation afforded. Women in the situation above described, having settlements elsewhere than in Manchester, if too far advanced in pregnancy, to be safely removed to their settlements, are placed by the town's officers in this room, for the purpose of being delivered. The expenses incurred in respect of the room are defrayed, in common with the general expenses of the workhouse, out of the parish rates. Mary Crocker being settled in the parish of St. Andrews Canterbury, but resident within the township of Manchester, and pregnant with a child likely to be born a bastard, was placed, by the officers of the town of Manchester, in the above-mentioned room in the workhouse, and was there delivered of the pauper, James, who was born a bastard. The question for the opinion of the court was, whether the above-mentioned room is an hospital, or place within the meaning of the act of parliament referred to, and whether, by force of that act, the settlement of James Crocker is in the parish of St. Andrew's, or whether it is in the township of Manchester.

Coltman, in support of the order of sessions, was stopped by the court.

Williams and *Starkie*, contrâ. The question here is, whether this be not within 13 G. 3, c. 82, s. 5, and that will depend upon the opinion of the court, whether the room mentioned in the case be an hospital and place within the [506] meaning of the third section of that act. *Now the act ought to have a liberal construction, being a highly remedial law. It is stated in the preamble, that such hospitals and places, established for the charitable reception of pregnant women, have afforded great relief, and merit every support and encouragement ; and the third section is not confined to hospitals, &c., for the public reception of pregnant women, and supported by charitable contribution, but extends to all other hospitals, houses, or places, that might thereafter be established in like manner, and for the like purpose. Here a license has been regularly obtained, and this is a place maintained by the public contribution of the parish, and may therefore be considered as supported by charitable contribution.

ABBOTT, C. J. It seems to me, that in this case we cannot consider this as an hospital or place, within the act. By the tenth section, the person having the management of it is directed, before the admission of any pregnant woman into such hospital, to take her before a justice, to be examined whether she be married or single ; and other duties are cast upon them for that purpose. By the fourth section, an inscription is to be placed over the door or public entrance of every such hospital, stating, that it is licensed for the public reception of pregnant women ; and the places spoken of in the third section are those used for the public reception of pregnant women, and supported by voluntary contribution. In the present case, it is only a room set apart for this purpose in the workhouse, the expenses of which are defrayed out of the poor's rate. I think, therefore, that this cannot be said to be used for the public reception of pregnant

women, nor supported by *charitable contribution. The township, therefore, is not protected by the fifth section; and the sessions have come to [507
a right conclusion.
Order of sessions confirmed.

The KING v. WOODMAN and Others.

A select vestry for the management of the parish affairs existing by ancient custom, cannot elect another select vestry for the management of the poor within the 59 G. 3, c. 12.

THE parish of Morpeth, in Northumberland, consists of several separate and distinct townships, each of which has its own overseers, and maintains its own poor. One of them is the town of Morpeth. Beyond the period of living memory, the church and *parish* affairs of the parish of Morpeth have been managed by a select vestry, consisting of 24 persons, of whom 16 have been taken from inhabitants of the town of Morpeth, and the remaining eight from the farmers in the country parts of the parish. The inhabitants constituting the select vestry have generally continued in office for life, unless they happened to leave the parish or decline to serve. In case of vacancy, the place of a town's member has been usually filled up by the remaining 15 belonging to the town, and the place of a country member by the remaining seven belonging to the country part of the parish; or as many of each set as may happen to be present on such occasions. None of the inhabitants, besides the 24, and the rector or curate, ever attended these vestry meetings. On the 19th of March, 1820, a notice signed by the churchwardens and overseers of the township of Morpeth was duly given, stating, that a meeting of the gentlemen of the 24 acting for the township of Morpeth would be held on *the 4th April, for the establishing [508 of a select vestry for the concerns of the poor of the township of Morpeth, and on the 4th April a meeting was accordingly held by 12 of the 16 persons acting for the township of Morpeth; at which meeting the defendant and 19 other substantial householders or occupiers within the township were nominated and elected to be members of such vestry, and an order of a magistrate was subsequently made, by which such 20 persons were appointed to act as a select vestry, for the care and management of the poor of the township of Morpeth. This order having been removed into this court, a rule nisi was obtained for quashing it, on the ground, that the persons appointed to constitute this select vestry were not chosen according to the provisions of the statute 59 G. 3, c. 12, at any general meeting in vestry of the inhabitants of the township, but at a meeting of a select body only. These several facts having been disclosed upon affidavits,

Scarlett and *Littledale* now showed cause. By the 59 G. 3, c. 12, the inhabitants of any parish in vestry assembled are empowered to establish a select vestry for the concerns of the poor of such parish, and to nominate and elect in the same or any subsequent vestry substantial householders or occupiers not exceeding 20, nor less than five, as shall in any such vestry be thought to be fit members of the select vestry. In general, all the inhabitants of a parish have a right to vote in any matter relating to the management of the parish concerns. By custom, however, this right may be transferred to a select number of the parishioners; and in this particular instance, 16 persons constituted a *select vestry for the general management of the concerns of the township [509 of Morpeth: they alone composed the vestry of that township: the other inhabitants would not constitute a legal vestry; and then by section 36 of this act it is expressly provided, "that nothing therein contained shall be construed to alter, affect, or disturb any select vestry, which in any parish has been established and acted upon by virtue of any ancient usage or custom." The words, "inhabitants of the parish in vestry assembled," contained in the first section, must be construed with reference to this provision, and must mean such of the inhabitants of the parish as constitute the legal vestry of the parish. If it be not so construed, the township of Morpeth, and all other places where by immemorial custom a select vestry has been established, will be deprived of the

benefit of this act of parliament, because in such cases the inhabitants at large would not constitute a legal vestry.

Hullock, Serjt., contra, was stopped by the court.

ABBOTT, C. J. I am clearly of opinion, that the sixteen persons who constituted the ancient select vestry for the township of Morpeth cannot be considered the inhabitants of the parish in vestry assembled within the meaning of the 50 Geo. 3, c. 12. The power to appoint a select vestry is expressly given to the *inhabitants* in vestry assembled; and here it was exercised, not by the inhabitants in vestry assembled, but by certain persons possessing some of the powers of the inhabitants in vestry assembled. It is not necessary in this case to decide what the inhabitants may do, but I have no difficulty in saying that, in my opinion, the inhabitants at large may assemble and appoint a select vestry *510] for "the care and management of the poor, not interfering with any of the rights of the ancient select vestry. The rule for quashing the order must therefore be made absolute.

Rule absolute.

The KING v. TURNER.

A licensed auctioneer going from town to town in a public stage-coach, and sending goods by public wagons, and selling the same on commission, by retail, or by auction, at the different towns, is a trading person within the meaning of the 50 G. 3, c. 41, s. 6, and must take out a hawker's and pedlar's license.

THIS was a conviction of the defendant, under the hawkers' and pedlars' act, 50 Geo. 3, c. 41. The offence charged in the information was, that the defendant, heretofore, to wit, on, &c., at, &c., was a *pedlar and trading* person, going from town to town, travelling with horses, exposing to sale goods; and that he did, on the day and in the year last aforesaid, as a pedlar and trading person, go from town to town, travelling with horses at, &c.; and did then and there, as a pedlar and trading person, going from town to town, and travelling with horses, expose to sale goods, to wit, china, &c. The defendant having appealed against this conviction, the sessions confirmed it, subject to the opinion of this court, on the following case.

The defendant had no hawker's license, but was a licensed auctioneer, having only two usual places of abode, the one at Bath and the other at Cheltenham. At Cheltenham he was the agent for the real workers or makers of the goods, for the purpose of selling such goods, as well by private contract as by public auction. The real workers or makers of the several goods mentioned were not in partnership, but were distinct employers of the defendant, for the *511] sale of their several property. In the beginning of the *month of March, 1820, certain goods, consisting of cabinet-ware, &c., were sent by the several real workers, or makers of them, to the defendant, at Cheltenham, with a request from them, that he would cause the same to be conveyed by public carriers' wagons from Cheltenham to the city of Worcester, and would himself proceed thither in order to sell the same there by public auction; and in case the whole of such goods should not be there sold, that he would cause the same to be conveyed by public carriers' wagons from Worcester to Gloucester, and would himself proceed to Gloucester, in order to sell the same there by public auction. The defendant, in compliance with this request, caused the goods to be conveyed by public carriers' wagons from Cheltenham to Worcester, and proceeded himself to Worcester some part of the way in a common stage-coach, drawn by four horses, and the other part of the way in a post-chaise, and when at Worcester exposed the goods for sale by public auction, and sold many of them by public auction to different persons. Shortly after the sale at Worcester, the defendant caused such part of the goods as were not sold at Worcester to be similarly conveyed to Gloucester, and proceeded thither himself by a stage-coach; and when at Gloucester, exposed such goods for sale by public auction, and sold many of them by public auction to different persons.

The whole of the goods belonged to the real workers or makers of them, the defendant not having any property therein; and the whole expenses of removing the goods from place to place were allowed to him in his account with the real workers or makers. The defendant paid regularly the auction duty upon such sales, which, together with the usual commissions, was allowed to him in his account with the real workers or makers of the goods. At the time of [512] the sales, neither the real workers or makers of the goods, or of any part thereof, or their children, apprentices, or known agents or servants usually residing with them, were present in Worcester or Gloucester, nor were Worcester or Gloucester, or either of them, an usual place or places of abode of any of the real workers or makers of the goods. The defendant was not the known agent or servant usually residing with the real workers or makers of such goods, or with any of them; nor was he a householder either at Worcester or Gloucester.

Shutt and Manley, in support of the order of sessions. The conviction is founded upon the 50 Geo. 3, c. 41. By the sixth section there is imposed an annual duty of 4*l.* upon every hawker, pedlar, petty chapman, and every other trading person going from town to town, or to other men's houses, and travelling either on foot or with horses, or carrying to sell, or exposing to sale any goods, &c. Now the defendant in this case was a trading person, going from town to town, travelling with horses, and exposing goods for sale. It is true, that perhaps he may not be a trader within the meaning of the bankrupt laws, yet, as an agent selling goods on commission, he is a trading person within the meaning of this act of parliament. By section 19, every person trading with a borrowed license incurs a penalty of 40*l.*, except servants travelling for a licensed master, with the license of such master, and for his benefit. This exception clearly shows, that the legislature considered that a stipendiary servant would be subject to the penalty of 10*l.*, as a trading person, within the sixth section. [513] if he travelled without a license; à fortiori therefore, a person selling by commission is within the meaning of this section. So, by section 23, the real makers of goods, or their agents or servants residing with them, are specially excepted. Now that exception would be unnecessary, if other agents were not meant to be included in the act. An agent, therefore, selling goods on commission, and otherwise answering the description mentioned in the act, is a trading person bound to take out the license required by the tenth section. The seventeenth section imposes a penalty of 10*l.* upon every such hawker, pedlar, petty chapman, or other trading person so travelling as aforesaid, who shall trade as aforesaid without a license. The words "trade as aforesaid" are sufficiently satisfied, by the fact of the defendant's having exposed goods to sale; for by the sixth section any trading person going from town to town, and carrying to sell or exposing to sale, is liable to pay the annual duty.

Scarlett and Russell, contrà. The conviction here is for travelling with horses; and as such statement is inserted in the conviction, it must be taken to mean a travelling with horses within the act, namely, with horses for which the defendant might have taken out a license, as required by the acts. But the facts of the case negative such statement, as they show that the defendant travelled in a public stage-coach, drawn by four horses; for which, of course, it cannot be contended that he should have taken out a license. The conviction, therefore, cannot be supported in its present form. But the defendant does not come within the words of the act, either as a hawker, pedlar, or other trading person. Hawkers are described in the statutes 25 H. 8, c. 9, [514] and 33 H. 8, c. 4; and it appears from thence, and from the mention made of them in other places, that they have always been considered as itinerant traders of low degree. It cannot be contended that the present defendant is a hawker; he is not convicted for being a hawker, but for being a pedlar and trading person. Now "pedlar" means nothing more than a petty dealer; and the quantity and value of the goods entrusted to the care of the defendant clearly show that he does not come within that description; neither does he come within

the words "other trading person." A trader is a person who seeks his livelihood by buying and selling; whereas this defendant only sold the goods of others on commission. Besides, the words "other trading person" must mean persons *eiusdem generis* with hawkers, pedlars, and petty chapmen; for it is a general rule in the construction of statutes, that where things of an inferior degree are first mentioned, those of a higher dignity shall not be included under general subsequent words, 2 Hawk. c. 27, s. 124. And an auctioneer who, as in this case, sells goods of large value on commission, is a person of a different description from a hawker or pedlar, and of higher degree. By section 14 it is enacted, "That every person to whom a license shall be granted, shall cause to be written on the most conspicuous part of every pack, box, bag, trunk, case, cart or wagon, or other vehicle of conveyance in which he shall carry his goods, the words 'licensed hawker.' " This evidently applies to the case of a person who conveys goods from place to place in his own cart or wagon, and not to one where the goods are *515] conveyed by a common stage wagon. It is further to be observed, that by section 7 of the act, any person travelling as a hawker, &c., or other trading person, and selling by auction, is subjected to a penalty of 50*l.*; therefore, if it should be holden that the present defendant comes within that description, he will in many instances be prevented from acting in his character of an auctioneer.

ABBOTT, C. J. The question intended to be submitted to us by the sessions is, whether a licensed auctioneer, conveying goods by a public stage wagon from place to place, and selling them on commission, is to be considered as a pedlar or trading person within the meaning of the 50 Geo. 3, c. 41. By section 8, it is enacted, "That there shall be paid an annual duty of 4*l.* by every hawker, pedlar, petty chapman, and every other trading person going from town to town, or to other men's houses, and travelling either on foot or with horses, or otherwise carrying to sell or exposing to sale any goods," &c.; and a further duty of 4*l.* in respect of every horse or other beast bearing or drawing burden. Now, it appears to me that the appellant is a trading person within the meaning of this section. It has been urged that he is not a trader, but an agent selling the goods of others on commission. It is clear, however, that agents were meant to be included within the act of parliament; for section 23 contains an express exception of the particular agents therein mentioned. Now, that exception would be wholly unnecessary, if other agents were not meant to be included within the act. The defendant in this case is convicted for having no license at all, and therefore I think the mode of travelling wholly immaterial. It has been said *516] that the conviction cannot be supported in its present form, inasmuch as the ground of it is, that the defendant travelled with horses. If it had been found as a fact in the case that the defendant had been convicted for want of a horse-license, I should have thought that the conviction could not be supported; for the horses in respect of which he is bound to take out a license are those bearing or drawing burden, or, in other words, carrying and drawing his goods. The defendant here was convicted for having no license at all; and I think, therefore, the word "horses" may be rejected. And, besides, in the way in which the present question is brought before us, we cannot look at the form of the conviction, but merely at the case submitted to us by the sessions. The order of sessions must therefore be affirmed.

BAYLEY, J., concurred.

HOLROYD, J. I doubted at first whether the words of the 17th section, "trade as aforesaid," would be satisfied without an actual sale of goods. I think, however, that those words refer to the sixth section, and that they are sufficiently satisfied by a mere exposure to sale. The ground of this conviction is, that the appellant had no license at all; and therefore the mode of travelling is immaterial, and need not be proved.

BEST, J. I am of the same opinion. I think the defendant clearly within the act, from the exceptions in the 9th and 23d sections, which otherwise would

have been quite unnecessary. It is said, that if we affirm this conviction, it will be impossible for an auctioneer to carry on his business; but that is not so. The "business of an auctioneer is to sell property in the town in which he resides; or to go to other persons' houses, and sell property for them [^{*517} at their houses. It is no part of the business of an auctioneer to travel from town to town, and sell goods there in the manner in which this defendant has acted.

Order of sessions confirmed.

DEAN qui tam v. KING.(a)

A person travelling from town to town, and having packages of books, &c., sent after him by public conveyance, and taking rooms at each town, and there selling such books, &c., by retail by auction, is a trading person within 50 G. 3, c. 41, s. 7.

DECLARATION against the defendant for penalties, under the hawkers' and pedlars' act. The first count charged that the defendant, at Axminster, in the county of Devon, being a trading person going from town to town, and travelling with a horse, and, not being a householder there, and that not being a usual place of his abode, did by himself sell by auction divers printed books, &c., contrary to the form of the statute; whereby he incurred a penalty of 50*l.* The second count charged that the defendant travelled on foot. The third and fourth counts charged him as a hawker and pedlar. There were other counts, charging offences committed at Honiton. At the trial before HOLROYD, J., at the last assizes for the county of Devon, the following facts appeared in evidence: in February, 1820, the defendant had been at Chard, but there was no evidence that he had sold any books there by public auction; he went from Chard to Axminster in a borrowed gig, but it did not appear that any books were sent or conveyed by him from Chard to Axminster. He took two rooms at Axminster, and sold books by retail and by auction there: he ^{went} from thence to [^{*518} Honiton. It did not appear in what mode he travelled: nine chests, containing books, &c., weighing 1325 lb., were sent from his rooms at Axminster by a common stage wagon, directed to him at Honiton, and there he sold books both by retail and by auction. It was proved that he was not a householder at Honiton or Axminster. Upon these facts, the learned judge thought that he was a trading person, going from town to town, within the meaning of the 50 Geo. 3, c. 41; and he directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

Casberd now moved accordingly. The defendant is not a person within the contemplation of this act of parliament, which applied only to hawkers and pedlars, and persons ejusdem generis. Now a hawker is a person who carries with him, either in a package or a cart, the goods which he intends for sale. In this case the goods were sent by a common stage wagon. The term "other trading person," in the act of parliament, applies to persons of the same description as a hawker and pedlar, who deals in a small way. Here the large quantity of goods which the defendant sent from Axminster to Honiton shows that he is not a dealer of that description; and, therefore, not a person within the contemplation of the act, which meant only to apply to petty dealers carrying their commodities with them. In *Dean, qui tam, v. Hereford*, tried at the Exeter Spring assizes, 1820, Wood, B., was of opinion, that a person who sent large quantities of goods by a ship to Plymouth dock, and conveyed them in a cart to Plymouth town, where he took a house, and sold them by auction, was not within ^{*519} this act. In that case it appeared that the goods, which were books, weighed two or three tons, and Wood, B., laid particular stress on that circumstance, and said, it was more than a person going from town to town, or to other men's houses, could carry. That case is directly in point to show, that the present defendant was not a person within the meaning of this act of parliament.

(a) This case was heard within the first four days of term.

ABBOTT, C. J. I am clearly of opinion, upon the facts of this case, that the defendant was a trading person, travelling from town to town, within the meaning of this act of parliament. The argument urged on the part of the defendant, arising out of the extent of his dealings, would go to show, that when the inconvenience to the resident tradesman is the greatest, no offence would be committed. I think that there should be no rule in this case. Rule refused.

The KING v. JOSEPH HANSON.

No appeal lies to the sessions from a conviction for selling ale without an excise license under 48 G. 3, c. 143, s. 5.

The defendant, on the 25th day of March, 1820, was convicted in the penalty of 50*l.*, by two justices for the West Riding of Yorkshire, for having within three months last past, (to wit,) on the 22d day of February, 1820, at Elland, in the West Riding, sold beer and ale by retail, to be drank and consumed in his house and premises, without first taking out an excise license authorizing him so to do, contrary to the 48 G. 3, c. 143, s. 5. Against this conviction, the defendant *appealed to the next sessions held at Pontefract, who allowed *520] the appeal and quashed the conviction, no evidence being offered in support of it. Upon which the proceedings were removed into this court by certiorari. The solicitor-general on a former day obtained a rule nisi, calling on the defendant to show cause why the order of sessions should not be quashed, upon the ground that no appeal lay to the sessions from the conviction in this case, and that, therefore, they had no jurisdiction to quash it.

Alexander showed cause. The question arises under the 48 Geo. 3, c. 143, s. 13, which provides, that all and every the powers, directions, rules, penalties, forfeitures, clauses, matters, and things, which by the act of 12 Car. 2, c. 24, or by any other law in force, relating to his majesty's revenue of excise, are provided and established, shall be incorporated in that act. Now, by 35 Geo. 3, c. 113, s. 12, which is an act in *pari materia* to the 48 Geo. 3, c. 143, an appeal is given to the sessions. It would be indeed hard, if all the clauses of that act by which penalties can be enforced against the subject should be considered as re-enacted, but the clause of appeal, his only protection, omitted. In *Rex v. Justices of Surry*, 2 T. R. 504, it was held that no appeal lay to the sessions from a conviction under 25 Geo. 3, c. 72, s. 9. But there was not in that case, as here, any act of parliament in *pari materia*. In *Rex v. Skone*, 6 East, 514, the judgment turned on the omission of the word penalties in the appeal clause, mentioned in 12 Car. 2, c. 24. Here the appeal clause contained in the 35 Geo. 3, *c. 113, has the word penalties. The King *521] v. *Skone* is therefore an authority in favour of the defendant.

The *Solicitor-General* and *Walton* were stopped by the court.

ABBOTT, C. J. The clause of reference in the 48 Geo. 3, c. 143, only applies to such powers, &c., contained in laws relating to his majesty's revenue of excise, as are provided, and established for managing, raising, levying, collecting, mitigating or recovering, adjudging or ascertaining, the duties thereby granted. Now the 35 Geo. 3, c. 113, imposed no duty, and is not an excise law. It is not, therefore, one of the laws referred to. Its object was the regulation of the police, and the provisions are quite distinct from those of 48 G. 3, c. 143. If, therefore, a person sells ale without the magistrates' license, he sells it subject to the penalty of 20*l.* provided by that act. Against a conviction for such penalty he may appeal. But under the 48 G. 3, c. 143, he is liable to a penalty of 50*l.* for selling without an excise license, and there is no appeal given. For the rule of law is, that although a certiorari lies, unless expressly taken away, yet an appeal does not lie, unless expressly given by statute. No act of parliament can be produced giving an appeal in the present case. The order of sessions is therefore wrong, and must be quashed. Rule absolute

*ZOUCH v. EMPSEY.

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Notice under 32 G. 2, c. 28, must be given to a creditor fourteen clear days, exclusive both of the day of service and that of presenting the petition.

THE lords' act, 32 G. 2, c. 28, requires that notice to the creditor should be given, fourteen days *at least*, before the petition is presented. The notice in this case was served on the plaintiff on the 19th of May.

Burnewall now, on the 2d June, moved to bring up the prisoner, and contended, that the fourteen days must be reckoned inclusive of the day of service, or of the day on which the petition is presented; and in that case the petition might be presented this day, and the prisoner brought up to be discharged on Monday. In *Morley v. Vaughan*, 4 Burr, 2525, this court held, in favour of liberty, that the day of giving the notice might be reckoned as one.

The Court were of opinion, that fourteen days at least must mean fourteen clear days, and refused the rule. Rule refused.(a)

(a) *Vide Roberts v. Stacey*, 13 East, 20; *Rex v. Justices of Herefordshire*, 3 B. & A. 581.

*SOWERBY and Another v. BROOKS, Assignee of CAR- [**523
BUTT, a Bankrupt, in Error.(a)

The issuing a commission of bankruptcy is not of itself sufficient notice to all the world of a prior act of bankruptcy having been committed; and, therefore, if a payment be made of a debt to a bankrupt after the issuing of such commission, but before the party paying has any actual knowledge of the bankruptcy, such payment will be protected within 1 Jac. 1, c. 15, s. 14.

THIS was a writ of error from the court of common pleas. The special verdict stated, that Carbutt being a trader, &c., committed an act of bankruptcy on 27th August, 1816: that a commission issued on the 7th October, 1816, under which he was duly declared a bankrupt; and on 28th November, 1816, defendant in error was duly appointed his assignee; that plaintiffs in error were co-partners in trade, and that whilst Carbutt was such trader, and before his bankruptcy, they were indebted to him in the sum of 95*l.* 4*s.* for goods sold and delivered by him to them before he became bankrupt; that on the 10th October, *being after the issuing the commission*, Carbutt, in order to obtain payment of the same debt, sent from Stockton, in the county of Durham, where he then was, a letter directed to one Henry Thomas, his agent at Manchester, in which letter he inclosed a paper, stamped with a stamp, for a bill of exchange in blank, excepting that the name of Carbutt was by him written thereunder, as the maker, and was also endorsed by him thereon, as the endorser, and by that letter he requested the said Henry Thomas to deliver the stamp so signed to his (Carbutt's) father, and to tell him to date it back and place it to his own account; that the stamped paper with Carbutt's name thereon was accordingly on the thirteenth of October delivered to his father, Francis Carbutt, at Manchester, *and that the same was on that day filled up by some person in the form of a bill of exchange, and that it was dated back to the 4th October, in [*524 the same year, and that, when it was so filled up, it purported to be the bill of Carbutt the bankrupt directed to the plaintiffs in error, whereby he requested them, at four months after the date thereof, to pay to the order of himself 95*l.* 4*s.*, value received, and to be duly endorsed by him; that the plaintiffs in error did not see the bill of exchange, nor had they any knowledge thereof until the 30th October, on which day it was presented to them for acceptance in the ordinary course of business, by a third person, who was then the bona fide holder thereof and was by them duly accepted, in order to discharge the said debt; *that the plaintiffs in error had not at any time before their acceptance of the bill any notice that Carbutt had become a bankrupt, or that he was insolvent, or had stopped payment, unless the issuing of the commission be by law deemed sufficient notice thereof*; that the notice of the commission and

(a) 3 Bayly Moore, 157.

bankruptcy appeared in the London Gazette for the first time on the 5th November, and that after the appearance of that notice, and after the defendant in error was appointed assignee, and before the bill of exchange became payable, namely, on the 14th January, 1817, the defendant in error, as assignee of Carbutt, demanded from the plaintiffs in error payment of the said sum of 95*l.* 4*s.*, but which they did not then nor have since paid to him ; that when the bill of exchange became payable, viz., on the 7th of February, 1817, the plaintiffs in error paid the said sum of 95*l.* 4*s.*, therein specified, to a third person, who was then the bona fide holder thereof, and that that sum so due from the plaintiffs in error to Carbutt, at the time of his bankruptcy, was not paid by them, *525] or satisfied in any other manner than as above mentioned.

The case was argued, on a former day in this term, by *Scarlett* for the plaintiffs in error, and by *Littledale* for the defendant in error. The authorities cited, and the arguments used, are all fully stated in the judgment of the court, and therefore have been omitted here.

Cur. adv. vult.

ABBOTT, C. J., now delivered the judgment of the court. This was a writ of error from the common pleas. The action was brought by the defendant in error, as assignee of one Carbutt a bankrupt, for goods sold. A special verdict was found at the trial, and thereupon the court of common pleas gave judgment for the plaintiff in that court, the now defendant in error. The material facts found by the special verdict are these. The commission of bankrupt was issued under the great seal, on the 7th of October, 1816. On the 30th of that month, the plaintiffs in error being indebted to the bankrupt for goods sold, accepted a bill drawn upon them for the amount of the debt, the bill being presented to them for acceptance in the ordinary course of business, and they not having had at any time before their acceptance of the bill any notice that Carbutt had become a bankrupt, or that he was insolvent, or had stopped payment, unless the issuing of the commission be by law deemed sufficient notice thereof. The commission was first advertised in the Gazette on the 5th November following ; the bill was afterwards duly paid at maturity by the plaintiffs in error. It is clear, that an acceptance of a bill, which is afterwards duly paid, is equivalent to a payment of the debt in money at the time of the acceptance, within *526] the statute 1 Jac. 1, c. 15, s. 14. And the question in the present case is only, whether the issuing of a commission is in law to be deemed notice of a bankruptcy to a debtor who pays his debt to the bankrupt under actual ignorance of his bankruptcy. The thirteenth section of this statute, after reciting that the power given to commissioners of bankrupts, touching the debts due to the bankrupts, is not so full and perfect as that the full benefit thereof, in due course, may be employed to the use of the creditors, as was intended, for remedy thereof enacts, that the commissioners shall have power to grant and assign the debts due to the bankrupt, by what person, or in what manner soever, to the use of the creditors ; and that, after such assignment, the bankrupt shall not have any power to recover, release, or discharge the same, nor shall they be attached as his debt, but the assignees shall have like remedy to recover the same, as the party himself might have had. The fourteenth section provides, "that no debtor of the bankrupt be thereby endangered for the payment of his debt, truly and bona fide, to any such bankrupt before such time as he shall understand or know that he is become bankrupt." The intended benefit mentioned in the statute 1 Jac. 1, is that which is to be found in the two former statutes, 34 and 35 Hen. 8, c. 4, and 13 Eliz. c. 7. These statutes gave power, viz., the first to the lord chancellor and other persons therein mentioned, and the latter to the commissioners, to take, by their discretion, orders and directions with the lands, goods, and debts of a bankrupt, and also to make sale of lands and goods ; such sales to be good against all persons claiming by, from, or under the bankrupt, by any act done after he shall become bankrupt ; but neither of *527] those statutes gave a power to make sale or assignment of his debts ; each of them, however, gave a further power to summon and examine

persons supposed to be indebted to a bankrupt, and also inflicted upon persons refusing to be examined, or not declaring the plain and whole truth, the forfeiture of double the value of the debt concealed, and not plainly and wholly declared and shown. On these older statutes, no case appears to have arisen on the subject of debts due to a bankrupt; and without other words than are found in those statutes, it would be difficult to say, that a debtor to a bankrupt having bona fide paid his debt to the bankrupt without notice of bankruptcy or commission, should be obliged to pay it over again. Such a case appears rather to be within the principle of bona fide transactions, protected by the seventh section of the statute of Elizabeth. On another branch of the statute of Elizabeth, the case of *Smith v. Mills*, 2 Co. 25, arose. In that case the bankrupt had, after his bankruptey and commission, sold goods to the value of 24*l.* to a creditor, in part satisfaction of a debt of 64*l.* The commissioners afterwards sold the same goods to the plaintiffs, and upon a question which of the two sales should be good, it was determined that the sale by the commissioners should be good, and that of the bankrupt void, and rightly so, for the creditor was within the very words of the statute: "a person claiming under the bankrupt by an act done after his bankruptey." And the expression which has been relied upon in the argument of this case occurs there only as an additional argument in favour of the decision. There is first a general declaration of the intent of the makers of the statute, viz., an equal and rateable distribution of the bankrupt's goods. Then follows a citation of some analogous cases; then an observation upon the great defect that would exist in the law, if a person, after committing an act of bankruptcy, should be allowed to make distribution of his goods to whom he pleased; and then is added, "also this case is stronger, because this gift is an assignment of the bankrupt after the commission awarded under the great seal, which commission is matter of record, whereof every one may take consonance." And it is said immediately afterwards, that the court relied principally on the words of the statute, "persons claiming under the bankrupt by act done after his bankruptey;" and resolved that the "proviso" (by which I understand the seventh section of the statute of Elizabeth to be meant) "concerning gifts and grants bona fide, makes no gift or grant good which the bankrupt makes after he becomes bankrupt, but excludes them out of the penalty inflicted by the same proviso," that is, the forfeiture of double as much as he shall detain or possess. The next case quoted on the behalf of the plaintiff below was that of *Hitchcock v. Sedgwick*, 2 Vernon, 156. That case in effect decides no more than this, viz., that a person who took a conveyance of lands from a bankrupt on an advance of money, after a commission issued, but without notice thereof, should not be allowed in a court of equity to protect the conveyance, which was undoubtedly void at law, by obtaining in trust for himself a prior conveyance, good in law, beyond the extent of the consideration for which that good conveyance had been made. The case was decided by the lords commissioners of the great seal, two of whom held that this person should not have the protection of the former conveyance beyond its own consideration; and they are reported to have held also, that "this person was not an innocent purchaser; saying that "when the commission was sued out, he was bound to take notice." Now, though it should be admitted, (and I see no reason to controvert the doctrine,) that a commission actually issued will enable the assignees to redeem an original mortgage, notwithstanding the term may have come into the hands of a second mortgagee, whose title is void at law; yet it will by no means follow, that one who has paid his debt to a bankrupt, without actual notice of a bankruptey, shall be compelled to pay it a second time to the assignees, upon the ground of an implied notice, by the issuing of a commission which is unknown to him. The other case of *Collett v. De Gols*, Ca. Temp. Talbot, 65, decides only, that a bona fide purchaser, after an act of bankruptcy without notice, should not be deprived in a court of equity of his legal advan-

tage; and the expressions attributed to the lord chancellor, "The case of *Hitchcock v. Sedgwick* is different from this; for a commission is a public act, of which all are bound to take notice," ought in our opinion to be understood with relation only to the case before him, and to those rules of equitable jurisdiction by which his judgment was to be guided, and not to be extended to the legal construction and effect of that clause of the statute of 1 Jac. 1, upon which the question before this court depends. The remaining case of *Watkins v. Maund*, 3 Camp. 308, turned merely upon the true meaning and effect of the phrase "issuing a commission," in the statute 46 Geo. 3, c. 135, s. 3. And Lord ELLENBOROUGH at nisi prius most properly decided, that the act of delivering out a commission under the great seal was an issuing within the meaning of that statute.

*530] *This view of the several former cases appears to leave the present question open to a decision upon the true meaning and effect of the stat. 1 Jac. 1, unfettered by precedent authority. It has been contended, that the fourteenth section of this statute is to be considered as a remedial law. I much doubt, and cannot assent to that proposition, because I have not been able to satisfy my mind that, before the passing of this statute, a debtor was really in any danger for such payment as is therein mentioned. It may rather be collected from some of the expressions used in the thirteenth section, and from the very imperfect provisions regarding debts due to a bankrupt contained in the two preceding statutes, that, before the passing of this act, 1 Jac. 1, a bankrupt might, notwithstanding his bankruptcy, receive the money due to him from his debtor, fraud and collusion apart, which, according to the principle of the common law, will vitiate every transaction founded upon them. I therefore consider these two sections, the thirteenth and fourteenth sections of 1 Jac. 1, as containing one new but qualified enactment: an enactment new in itself, as giving power to the commissioners to assign the debts due to the bankrupt, and qualified by providing, that no debtor should be thereby endangered for the payment of his debt truly and bona fide to any bankrupt, before such time as he should understand or know that he was become a bankrupt. And we are all of opinion, that these words, "understand or know," are to be construed according to their ordinary and popular sense, of an actual understanding or knowledge, and not of a knowledge to be implied by force of law from the secret issuing of an unknown commission, against the truth of the fact. And we find nothing in the language *of subsequent statutes, regarding bankruptcy, to impugn this construction.

*531] The 21 Jac. 1, c. 19, s. 14, which is properly a remedial law, protects all purchasers for good and valuable consideration, unless a commission be issued within five years after a bankruptcy. The 19 G. 2, c. 32, which is also a remedial law, protects the payment of money made by a bankrupt, which, before the suing forth of the commission, is really and bona fide, and in the usual and ordinary course of trade and dealing, received of a bankrupt, before such time as the person receiving the same shall know, understand, or have notice that the party is become a bankrupt, or is in insolvent circumstances. It is obvious that the issuing of a commission is not, under either of those statutes, made equivalent to notice. It is in truth made only the limit of the period to which the relief thereby given should be confined. And it is to be observed, that the latter of these two statutes regards only payments made by the bankrupt, and there is a great difference between losing the benefit of a receipt of money and being subjected to make a payment twice over: the first payment by the debtor to the bankrupt must, unless there be great misconduct on the part of the bankrupt, enure, by an increase pro tanto of the distributable fund, to the benefit of those very creditors who claim the second payment of the same debt: whereas a receipt from a bankrupt operates pro tanto in diminution of the distributable fund, and, so far as it extends, defeats the general object of the law an equal division among all the creditors. The first statute, wherein the issuing of a commission is in express terms made equivalent to notice of bankruptcy

or insolvency, is the 46 G. 3, c. 135. This is also a remedial law; and the remedy operates much more extensively than under any former statute; for it extends, in cases of future commissions, to all conveyances by, all payments by and to, and all contracts and other dealings and transactions by and with any bankrupt bona fide made and entered into more than two calendar months before the date of the commission, meaning the commission under which they might otherwise be impeached. And the legislature thought fit to limit this extensive remedy, not only to the absence of actual notice of bankruptcy or insolvency, but also, by express words, to the absence of any prior commission, or docket struck, although nothing may have been done thereupon, or the commission be superseded; and this is effected in form by providing, that those acts should be deemed notice of a prior act of bankruptcy within the meaning of that statute, if an act of bankruptcy had been actually committed. Large as the remedy provided by this statute, 46 G. 3, appears to be, it was thought not to include the case of an execution or attachment against the lands or goods of a bankrupt; and, therefore, the remedy was extended to those cases by the 49 G. 3, c. 121, s. 2, with a similar proviso as to a commission issued, although afterwards superseded. We are aware of the expression in each of these two statutes, "a commission issued, although the same may have been superseded." By the first of the two statutes, in which such a provision occurs, the striking a docket was made equivalent to notice: this is a less formal and effective act than the issuing of a commission, and is an act upon which, I believe, it often happens that no commission is taken out. And if the legislature, in providing a new and very extensive remedy, thought fit to make the striking *of a docket notice, it would, *à fortiori*, make the issuing of a commission notice, although it should be superseded. And this provision might be retained in a statute made to extend the class of cases to which the first applied, although the effect of striking a docket was at the same time repealed. And we cannot infer from these statutes that the legislature considered the issuing of a commission to be by operation of law, and against the truth of the fact, an understanding or knowledge of a bankruptcy within the meaning of the fourteenth section of the statute 1 Jac. 1. We think, also, that too much effect has been given in the course of this cause to those dicta in the older cases, which were uttered with reference to a different statute, and on a different occasion. Our present opinion derives confirmation from the subsequent statute of the 56 G. 3, c. 137, which does not appear to have been adverted to in the court of common pleas. This last statute was passed for the express purpose of extending the provision of the statute 1 Jac. 1, and it does in effect extend the provision therein contained, in regard to payment of debts to a bankrupt, to the delivery of his goods or effects to him, and this in terms precisely similar to those of the statute 1 Jac. 1, by enacting, that no person *shall be endangered* by reason of the delivery of goods or effects, truly and bona fide, to a person who shall be bankrupt, before such time as the person having the goods, &c., shall understand or know that the person to whom they belong is become bankrupt. Now this statute was passed after the two before mentioned, wherein the issuing of a commission is made notice of a bankruptcy, and not long after. It is manifest that the legislature did not, in this case, intend that a superseded commission should *be deemed notice; for if that intention had been entertained, it can hardly be doubted that it would have been expressed in the same terms as in the two statutes so recently passed. If such a clause had been introduced, it seems the statute would have been entirely useless, because the case provided for by it is a case within the meaning and operation of the statute 46 G. 3. It appears, therefore, to have been framed to extend a particular provision of the statute 1 Jac. 1 to another and analogous case, and this unfettered with that special enactment as to notice by operation of law, which is found in the 46 G. 3. These observations do not conclusively prove, with the certainty of mathematical demonstration, that the legislature might not think a

commission notice to all the world, if it should be acted upon as well as issued, and not afterwards superseded ; but we think they furnish a moral inference that no such opinion was entertained ; because if such an opinion had been entertained, we think some expression or intimation of that opinion must have occurred. Finding nothing of this sort, as applied to the case of the payment of money due to a bankrupt, or the delivery of his own goods to him, and adverting to the obvious distinction, before alluded to, between those two cases and the cases of title derived or money received from a bankrupt, we think that in the case before us the issuing of the commission was not notice in point of law, and we are all of opinion that the judgment of the court of common pleas must be reversed.

Judgment reversed.

[See Sugden Vend. 497 ; 1 Scho. & Lef. 152.]

*JOHNSON v. WALKER.

Plaintiff in an inferior court, from which a cause is removed by habeas corpus, and a rule for better bail given, is not entitled to a procedendo, after render of defendant and notice of such render, although the render be made after the day on which the rule for better bail expires.

Thesiger, on a former day in this term, had obtained a rule nisi for setting aside the writ of procedendo issued in this cause. It appeared, from the affidavits, that the cause was commenced in Hilary vacation in the Palace Court, and that it was removed by habeas corpus, and a rule for better bail served, on the 9th of April last. Notice of justification was given for the first day of Easter term ; the bail did not justify on that day ; but on the second day of Easter term the defendant was rendered, and notice of render served upon the plaintiff's attorney ; after which, upon the same day, the writ of procedendo was issued.

Lawes now showed cause, and distinguished this case from *Farquharson v. Fouchecour*, 16 East, 387, upon the ground that there the render had been made on a day previous to that on which the procedendo issued ; and he referred to *Davis v. Tuddenham*, 1 Chitty, 130, where the procedendo having issued on the same day on which the bail justified was held to be quite regular. He referred also to *Rex. v. The Sheriff of London*, 1 Chitty, 567, where an attachment was issued after a notice of render, the render having been out of time ; and it was held that the attachment was regular.

Abbott, C. J. In the report of *Davis v. Tuddenham*, it does not appear whether or not there was any notice *of the bail having justified served upon the plaintiff's attorney, which makes all the difference. There the time for justifying the bail expired on the 18th, and the procedendo issued on the 19th ; and if that was issued before notice of the justification was served, it would be regular. But here, the procedendo issued after notice of the render, and that brings it within the case of *Farquharson v. Fouchecour*, which must govern our decision. Besides, what necessity can there be for going down again to the inferior court, when the defendant being rendered the plaintiff has him in court, and may proceed against him here. This rule, must, therefore, be made absolute.

Rule absolute.(a)

(a) On examining the affidavits in *Davis v. Tuddenham*, we find that they do not state that any notice of bail having justified was given previously to the issuing the writ of procedendo in that case.

REYNOLDS v. HANKIN.

An arrest of a party, described in a testatum special capias and in the affidavit to hold to bail by the initials of his Christian name only, is irregular.

D. F. JONES had obtained a rule, calling upon the plaintiff to show cause why the bail-bond, given in this case, should not be delivered up to be cancelled, and the defendant discharged upon entering a common appearance, he having been arrested on a testatum special capias by the name and description of F. W. Hankin, and the affidavit to hold to bail having described him in -

similar manner, without setting out his Christian name at length. The affidavits on the other side stated, that the defendant was indebted to the plaintiff, *by virtue of an acceptance of a bill of exchange, signed by the defendant with the initials of his Christian name, and that the plaintiff had endeavoured, without effect, to ascertain his Christian name previously to the arrest. [**537

Chitty showed cause, and referred to *Howell v. Coleman*, 2 Bos. & P. 466, as expressly in point.

Jones, contrà, mentioned two cases, of *Turner v. Colville*, and *Morland v. Same*, in this court, in Michaelmas term last, in which the court had, under similar circumstances to the present, made the rules absolute. *Cur. adv. vult.*

And now, on this day, *Abbott*, C. J., stated, that the court had looked at the affidavits in the cases to which they had been referred, and that, upon the whole, they were of opinion, that it was not sufficient to describe a person by the initials of his Christian name only, and that, therefore, the rule must be made absolute.

Rule absolute.

WILSON v. FARR.

An alias scire facias issued against bail must be left at the sheriff's office four days, exclusive both of the day of lodging it and the day of the return.

Hutchinson had obtained a rule to show cause why the writs of scire facias issued against the bail in this cause should not be set aside. It appeared that a scire facias was issued, and left for a return of nihil, and lodged at the office of the sheriff of Middlesex on the 30th January, being returnable on the 3d *Fe-
bruary, and that an alias scire facias was issued and left at the office for a like return on Tuesday, February 6th, returnable on Saturday, February 10th. [**538

Long showed cause, and referred to the rule 5 Geo. 2, 1732, Easter term, and contended, that it was not necessary that the four days, during which an alias scire facias was to lie in the office, should be exclusive both of the day of lodging it and of the day of the return.

Hutchinson, contrà, referred to *Anonymous*, 2 Salk. 599, and *Howard v. Smith*, 1 B. & A. 529, where it was held, that a ca. sa. against the principal, in order to charge the bail, must lie four days exclusive at the sheriff's office; and he contended that a similar rule was applicable to the present case.

Per Curiam. There is a difference of expression in the rule 5 Geo. 2. In the first part of it, it states, that ever. writ of scire facias, of which notice shall be given to the defendant, shall be left in the office four days before the return exclusive of the day of return; but in the latter part of the rule, which is applicable to the present case, the phrase is different: it is there stated, that every writ of alias scire facias shall be left in the office four days exclusive before the return. We are, therefore, of opinion, that the four days must be exclusive of the day on which the writ is lodged, and of the return day also. The present rule must, therefore, be made absolute.

Rule absolute.

*RULES OF COURT.

[**539]

IT IS ORDERED, That in all country ejections, which hereafter shall be served before the escheat-day of any Michaelmas or Easter term, the time for the appearance of the tenant in possession shall be within four days after the end of such Michaelmas or Easter term, and shall not be postponed till the fourth day after the end of Hilary or Trinity terms respectively following. By the court.

IT IS ORDERED, That in future, where a rule to show cause is obtained in this court to set aside an award, the several objections thereto, intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to show cause. By the court.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,

Trinity Term,

IN THE SECOND YEAR OF THE REIGN OF GEORGE IV.

BRUNTON v. HAWKES and Others.(a)

A patent for improvements in the construction of ships' anchors, windlasses, and chain-cables, cannot be supported unless there is novelty in each invention; and therefore, where it turned out that there was no novelty in the construction of the anchors, it was held that the patent was wholly void.

DECLARATION stated that plaintiff was the first and true inventor of certain improvements in the construction of, making, or manufacturing of ships' anchors and windlasses, and chain-cables or moorings; and which said invention, others before the making of the patent did not use, and thereupon, on the 26th March, 1813, by letters patent, reciting that plaintiff had by his petition, humbly represented to our lord the king, that he, plaintiff, had found out and discovered certain improvements in the construction of, making, or manufacturing of ships' anchors and windlasses, and chain-cables or moorings, which he conceived would be of "public utility; that he was the first and true inventor thereof; and that the same had been theretofore made, used or practised by any other person to the best of his knowledge, our lord the king granted unto plaintiff his special license, full power, sole privilege, and authority, that plaintiff, his executors, &c., from time to time, during fourteen years, should and lawfully might make and exercise and vend *his said invention*, &c. The patent was then set out in the usual form. The declaration then stated the enrolment of the specification within the time prescribed, and the infringement of the patent, by the defendant selling chain-cables of the improved construction invented by plaintiff: Plea not guilty. The cause was tried before ABBOTT, C. J., at the Middlesex sitting, after Easter term, 1820. The specification stated the plaintiff's improvements in manufacturing ships' anchors to be, that in place of the common method of joining the arms to the shank, which was by welding, and which required the iron to be so frequently heated as to destroy and injure its tenacity, he made the shank in one piece, and the two arms in another piece. The piece intended for the arms is formed into shape, and of such a thickness or substance in the middle, as to allow a hole to be made through the centre of the solid piece, to receive the thick end of the piece which forms the shank, and the said hole in the arm-piece is made somewhat conical or bell-mouthed, so that no strain can separate the arms from

(a) This and the two following cases were argued at the sittings before Easter term.
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the shank ; by which means the necessity of endangering the solidity of the materials is avoided, only one heat being necessary to bring the thick end of the shank and the hole in the arm-piece into perfect contact ; for the strength of this important part of the anchor is not trusted to a *union effected [543] by welding, which may be, and generally is, defective ; but to the im- possibility of drawing a thick solid conical piece of iron through the smaller aperture of a conical opening into which it is fitted. The arms with their flukes may be made of good cast iron, taking care to allow them sufficient substance. But anchors should not only have the utmost strength which can be attained, but also be made as secure as possible against the danger of being lost, by the cable or chain by which they are attached to the ship giving way. Cables made of hemp can never be rendered safe, but chain-cables may. The specification then described the improvements in the construction of chain-cables and moorings, and stated, that the object to be gained was the greatest possible strength from a given quantity of materials, keeping in mind the direction in which the strain is to be borne. It then showed, that the applying receding forces to a circular link, would change its form into one with round ends and parallel sides, and that the effect of this alteration was to destroy the link, by disturbing the relative position of every particle of the metal and destroying its corpuscular attraction, and concluded that a circular was therefore a bad form. The specification then stated, that if the sides of the circular link were prevented from collapsing, the evil would be thereby lessened ; and that, if a stay or diagonal bar were introduced between the sides of the circular link, it would then be able to resist a greater force than before, having two points of support ; the unsupported parts, however, would, by applying a strain, assume a quadrilateral form, a change which could not be effected without a derangement of the matter in the link, which must rupture and destroy it. It stated, that stays [544] with pointed ends had been used in chains, but that such a stay only supported two opposite points of the link ; the tendency of the receding forces being to straighten and consequently to rupture the parts that were left unsupported. It then proceeds thus : " My said improvements in chain-cables or moorings are founded on considerations drawn from the facts that have been alluded to. If a circular link, instead of being supported only in two opposite points, have its opposite sides supported by a stay embracing two considerable and opposite segments, taking care to leave such opening as shall allow sufficient play for the links received into it, the link would be much stronger than with a stay having its ends pointed ; but still the link would be of a bad form ; and, moreover, even if circular links could be made unobjectionable as to strength, they should be avoided on account of the greater weight of metal which a given length of chain would require, than when formed of links of a less exceptionable form. We have seen that the tendency of receding forces applied to curved links, is to draw portions of them into straight forms ; thence, it follows, that twisted links of every kind should be avoided where strength is required ; for such links, even if their opposite sides be supported by an interposed stay, must by the application of a sufficient strain untwist themselves to become straight, and thus have the arrangement of their particles disturbed. As the tendency of forces, applied as before mentioned, to curved or twisted links, is to convert the curves or distortions into straight portions as above described, it follows, that links presenting in their original construction straight parts between the points of strain are the strongest that can be made, with an equal portion of metal ; and hence links with *parallel sides and semi- [545] circular ends, would in every case be preferred, were it not necessary to the quality of good chain, that it should be able to resist lateral violence, as well as a general strain operating by stretching." After showing the effect of a lateral strain upon such a link the specification then proceeded thus : " From the preceding considerations it is evident, that of all the forms and constructions

that can be given to a link, that form and construction which shall be able to convert a lateral into an end strain, by yielding proper support to the opposite sides of the link, is the one that should be preferred ; and of such a form and construction is the link described in a figure annexed to the specification having circular ends and sides nearly parallel but bulging out towards the middle, with my broad-ended stay introduced between the sides of the link. At the time the stay is introduced, the link is wide enough to receive it ; and the link being red hot at the time of its introduction, and being pressed home to the stay, by a die or press, or any suitable mechanical means, takes a fast hold of it and retains it in its place. Other ways of introducing and retaining in its place this broad-ended stay may be employed ; but the preceding one has been found exceedingly simple and efficacious. These broad-ended stays should embrace the whole or the opposite curved parts of the middle of the link."

It was proved at the trial, that before the granting of the patent, mooring-chains had been used, the links of which were twisted, and the stay was introduced into holes made in the sides of the link ; the twisting of the link, as well as the perforations of it to admit the stay, had the effect of weakening it. The sides of the plaintiff's link were in the same plane, and his stay was introduced [546] in the manner described "in the specification, without perforating or otherwise weakening the sides. It was also proved by a series of experiments, made by scientific men, that the plaintiff's mooring-chains were capable of resisting a much greater force than those in use before. It was admitted at the trial, that the mode of manufacturing anchors described in the specification, had never been applied before to ships' anchors. But it had been applied before to the adze-anchor, and the mushroom-anchor. These anchors are used only for the purpose of mooring floating lights or vessels intended to remain stationary ; and are never taken on board. No point was made as to the windlasses, which were admitted to be new. ABSOTT, C. J., left it to the jury to say, whether the invention both as to the chain and the anchor, were new and useful, and the jury found a verdict in the affirmative for the plaintiff. A rule nisi was obtained for a new trial, on the ground, first, that there was not sufficient novelty in either of these inventions, to make them the proper subject of a patent. Secondly, that at all events, there was no novelty in this mode of manufacturing anchors ; and the patent being granted for three several things, if void as to one, was void as to the whole.

Scarlett, Marryat, Gurney, and Chitty, now showed cause against the rule. There is sufficient novelty in either of the inventions described in the specification, to sustain a patent. The invention, as to the mooring-chain, comprises the combination of the particular form of link with the particular form of stay. Links had existed before in every shape, and stays had been applied before for a variety of purposes. The merit of the plaintiff's invention consists in this, [547] that he has so combined his link and stay together, as to give "it the greatest possible strength. That is effected, by placing the stay in such a position, as to make the link continue in its original shape, when it is subjected to the greatest strain. The link and stay are so united together, as that the former will never alter its form without a rupture, and that has never been accomplished before. The invention, therefore, does not consist in the form of the link or the form of the stay, although if either is altered, the invention would be destroyed. If the stay were pointed, it would operate unfavourably on that part of the link against which it rested, and, therefore, it is necessary to have a broad ended stay to prevent the chain collapsing. If the link be twisted, it would not have its full play ; if it were circular, it would be changed by a strain, into an oval form. Secondly, the invention as to the anchor is new. The mode pointed out in the specification has never before been applied to the manufacturing of ships' anchors. It is true, that it has been applied to that, which, from the poverty of language, is embraced under the same generic

word, viz. a mushroom-anchor. That, however, is never taken on board a ship, but is deposited; a quantity of sand is thrown on it, and it then becomes fixed to the spot, and, though called an anchor, it is, in fact, a sub-marine post. It is used for the purpose of floating lights, and cannot be raised. The object of a ship's anchor, on the other hand, is to bring the ship to a fixed position; it is to be afterwards raised and carried with the ship. If the former had been called an iron sub-marine mooring-post, it could not have been an objection to the plaintiff's patent, that he had first applied this mode of uniting the parts used in that mooring-post to ships' anchors. The merit of the plaintiff's invention consists in the application of a *known principle to a new subject matter. It is true, that this mode of uniting the flukes to the shank has long been in use, in the case of the common hammer and the pick-axe; but they are instruments applied to very different purposes. The merit of this patent consists in the first application of that mode of uniting the several parts to ships' anchors. An adze-anchor, also, is formed in the same manner, but that, also, is no more than a mooring-post. The plaintiff has first applied to a ship's anchor a mode of construction never used before, and the jury have found it to be both new and useful. Assuming, however, that this mode of manufacturing anchors was not new, the patent is then only void ^{*548} pro tanto. The patent is for improvements in three things, distinct in their nature; for each of these the plaintiff might have obtained a separate patent. If, indeed, it were taken out for the combined use of three things, in a case where the invention would not be perfect unless all three were brought into action, the patent would necessarily be void, unless the whole were new. The crown, by its prerogative, might grant three different estates in three different counties, by one patent. If, from some circumstance, the grant was void as to one estate, it by no means follows that it would be void as to the other two; so, if an individual was to convey three estates by one deed, and the consideration for the conveyance of two was clear and distinct, but there was fraud as to the other, so as to make the grant as to that void, the deed would not be void as to the whole. In *Hill v. Thompson*, 2 Bayly Moore, 424, the patent was for an invention of certain improvements in the smelting and working of iron, or, in other words, in the manufacture ^{*of} iron. The improvements there contemplated, applied entirely to one subject matter. The inventor there, ^{*549} assumed to himself to produce different results from the same process. He was, in the course of that process, to extract the iron, and also to remedy a certain disease to which that iron was liable. That was done in the course of carrying it through the same furnaces; that was one entire operation, described in the patent as producing certain distinct results, and it was applied to the same subject matter. Besides, that case was decided upon another ground, viz., upon the want of proof of the imitation of the invention. In this case, the new inventions are applicable to different and distinct objects, viz., the cable, the windlass, and the anchor, each of which may be separately used. The plaintiff, in effect, has only comprised in one patent the subject of three distinct inventions. Suppose a man had invented an original form of a chair for a gouty man, and also an anchor, and he had taken out one patent for the two, and it turned out, in the event, that the anchor was not new, the patent would not, therefore, be wholly void.

ABBOTT, C. J. It is not without great reluctance that my mind has at length come to a conclusion, which (as far as my judgment goes) will have the effect of avoiding this patent. It appeared in evidence, at the trial, that the mode of making cables and anchors, introduced by the plaintiff into general use, was highly beneficial to his majesty's subjects; and I should wish that he who introduced it might be entitled to sustain the patent. Upon a full consideration of all the arguments that have been addressed to us, and a view of the patent, the specification, and the evidence given at the trial, I feel myself compelled to

*550] say, that I think so much of the *plaintiff's invention as respects the anchor is not new ; and that the whole patent, is, therefore, void. The mode of joining the shank to the flukes of the anchor is to put the end of the shank, which is in the form of a solid cylinder, through the hollow and conical aperture and it is then made to fill up the hollow, and to unite itself with it. Now that 's precisely the mode by which the shank of the mushroom-anchor is united to the mushroom top ; by which the shank of the adze-anchor is united to its other parts. It is indeed the mode by which the different parts of the common hammer, and the pick-axe also, are united together. Now, a patent for a machine, each part of which was in use before, but in which the combination of the different parts is new, and a new result produced, is good ; because there is a novelty in the combination. But here the case is perfectly different; formerly three pieces were united together ; the plaintiff only unites two ; and, if the union of those two had been effected in a mode unknown before, as applied in any degree to similar purposes, I should have thought it a good ground for a patent ; but, unfortunately, the mode was well known, and long practised. I think that a man cannot be entitled to a patent for uniting two things instead of three, where that union is effected in a mode well known and long practised for a similar purpose. It seems to me, therefore, that there is no novelty in that part of the patent as effects the anchor ; and, if the patent had been taken out for that alone, I should have had no hesitation in declaring that it was bad. Then, if there be no novelty in that part of the patent, can the plaintiff sustain his patent for the other part, as to the mooring-chain ? As at present advised,

*551] *I am inclined to think that the combination of a link of this particular form with the stay of the form which he uses, although the form of the link might have been known before, is so far new and beneficial as to sustain a patent for that part of the invention, if the patent had been taken out for that alone. But inasmuch as one of the things is not new, the question arises, whether any part can be sustained. It is quite clear that a patent granted by the crown cannot extend beyond the consideration of the patent. The king could not, in consideration of a new invention in one article, grant a patent for that article and another. The question then is, whether, if a party applies for a patent, reciting that he has discovered improvements in three things, and obtains a patent for these three things, and in the result it turns out that there is no novelty in one of them, he can sustain his patent. It appears to me, that the case of *Hill v. Thompson*, which underwent great consideration in the Common Pleas, is decisive upon that question. In that case, the patent was granted to the plaintiff for the invention of certain improvements in the smelting and working of iron ; and the Court of Common Pleas appear to have considered that the improvement introduced by the plaintiff into what may properly be called the smelting of iron, was the obtaining iron from that cinder and slag which before had been thrown away as refuse, and that that might be considered as new. It appeared, however, that the plaintiff claimed further the merit of having discovered that the application of lime in certain stages of the process would cure a disease common to all iron, not merely to that which he was to produce, but to iron originally manufactured from the fresh ore. Now it

*552] *turned out that that was not a discovery ; for the application of lime to iron made from the cinder, originally used in making ore, was known and practised before. No two things can be more distinct in their nature than the obtaining of iron from a material from which it was impracticable to obtain it before, and the cure or prevention of a disease to which all iron was subjected. In that case, however, the Court of Common Pleas held, that, admitting there was novelty in the one, yet, as there was no novelty in the other, the patent was wholly void. The only difference between that case and this is, that here the plaintiff, instead of saying that he has made certain improvements, states the improvements ; but still he claims the merit of having invented improve-

ments in all the three. The patent is granted upon the recital that he has made improvements in all the three, and that they are new; and the consideration of the patent is the improvement in the three articles, and not in one; for an improvement in only one of them would render the patent bad. The consideration is the entirety of the improvement of the three; and if it turns out there is no novelty in one of the improvements, the consideration fails in the whole, and the patentee is not entitled to the benefit of that other part of his invention. For these reasons, I am of opinion that this patent cannot be supported. There must, therefore, be a new trial. The plaintiff, if so advised, may then put the question upon the record, and take the opinion of a court of error.

BAYLEY, J. I think that in this case, there ought to be a new trial. I have no doubt that if the patent be bad as to part, it is bad as to the whole. If a patent is *taken out for many different things, the entire discovery of [*553 all those things] is the consideration upon which the king is induced to make the grant. That consideration is entire, and if it fails in any part it fails in *toto*. Upon an application for a patent, although the thing may be new in every particular it is in the judgment of the crown, whether it will or will not, as matter of favour, make the grant to the person who has made the discovery. And when an application is made for a patent, for three different things, it may be considered by the persons who are to advise the crown as to the propriety of the grant, that the discovery as to the three things together may form the proper subject of a patent although each *per se*, would not induce them to recommend the grant. It seems to me, therefore, that if any part of the consideration fails, the patent is void *toto*. Now, in this case, the patent is for the improvement of ships' anchors, and windlasses, and chain-cables, or moorings. If it had stood on the subject of the improvement in chain cables only, the impression on my mind is, that the patent would have been good. The improvement in that respect, as it seems to me, is shortly this: so to apply the link to the force to operate on it, that that force shall operate in one place, namely, at the end; and this is produced by having a bar across, which has not the defect of the bar formerly used for similar purposes. The former bars weakened the link, and they were weak themselves, and liable to break, and then if they broke, there might be a pressure in some other part. Now, from having a broad-ended bar, instead of a conical one, and having it to lap round the link, instead of perforating it, that inconvenience would be avoided; and therefore the present impression on my *mind as to this part of the case [*554 is, that the patent might be supported. As to the ship's anchor, in substance the patent is, for making in one entire piece, that which formerly was made in two. The two flukes of the anchor used to consist of distinct pieces of iron, fastened to the shank by welding. In the present form, the flukes are in one piece, and instead of welding them to the shank, a hole is made in the centre, and the shank introduced through the hole. Could there be a patent for making, in one entire piece, what before had been made in two pieces? I think not; but if it could, I think that still this would not be new. In the mushroom and the adze-anchor, the shank is introduced into the anchor by a hole in the centre of the solid piece; and in reality, the adze-anchor is an anchor with one fluke, and the double fluke-anchor is an anchor with two flukes. After having had a one-fluked anchor, could you have a patent for a double-fluked anchor? I doubt it very much. After the analogies alluded to in argument, of the hammer and pick-axe, I do not think that the mere introducing the shank of the anchor, which I may call the handle, in so similar a mode, is an invention for which a patent can be sustained. It is said in this case, that the mushroom-anchor, and adze-anchor, are not ships' anchors, but mooring-anchors. I think they are ship's anchors; they are not indeed such anchors as ships carry with them, for the purpose of bringing the ship up; but if the ship is required to be stationary, at a particular place, then the common

mode of making it stationary, is by the mushroom-anchor. So the mode adopted to bring a ship containing a floating-light to an anchor, is by mooring her to one of these mushroom anchors. That is the description of anchor *555] "for a holdfast to the ship. The analogy between the case of the mushroom-anchor, and of the adze-anchor, is so close to that of the present anchor, that it does not appear to me that this discovery can be considered so far new as to be the proper ground of a patent. In reality, it is nothing more than making in one piece, what before was made in two, and introducing into this kind of anchor, the shank in the way a handle is introduced into a hammer or pick-axe. I think, therefore, that this not being a new discovery, the patent is wholly void, and that being so, there must be a new trial. The plaintiff may then put the question upon the record, and take the opinion of a court of error on the subject.

BEST, J. I am of the same opinion. In the case of *Hill v. Thompson*, the Court of Common Pleas, with great reluctance, came to the conclusion, that a patent taken out too large, is not only void for the excess, but void altogether. That case afterwards came under the consideration of the lord chancellor; and he is reported to have said, "In his directions to the jury, the judge has stated it as the law on the subject of patents, first, that the invention must be novel; secondly, that it must be useful; and, thirdly, that the specification must be intelligible. I will go further and say, that not only must the invention be novel and useful, and the specification intelligible, but also that the specification must not attempt to cover more than that, which being both matter of actual discovery and of useful discovery, is the only proper subject for the protection of a patent, and I am compelled to add, that if a patentee seeks, by his specification, any more than he is strictly entitled to, his patent is thereby rendered *556] ineffectual, even to the extent to which he would be otherwise fairly entitled. On the other hand, there may be a valid patent for a new combination of materials previously in use, for the same purpose, or for a new method of applying such materials; but in order to its being effectual, the specification must clearly express that it is in respect of *such new combination or application*, and of that only, and not lay claim to the merit of original invention in the use of the materials." (a) The case, indeed, does not want that authority; for in the patent the king states, that he grants it upon condition that the specification shall be enrolled in the Court of Chancery for the inspection of the public. According to these terms, therefore, the specification must embrace two objects; it must first clearly describe the nature of the invention; and, secondly, the manner in which it is to be performed. When this case was first presented to my mind, it occurred to me, that this was a new combination of old principles, and that the patent was therefore good. I now, however, doubt whether the patent could be supported as to the mooring-chain, for the specification cannot stand as a description of a new combination of known principles: it claims an invention as to a part of it, which certainly is not new. I allude, particularly, to the form of the link. The specification states, that the object to be gained, is the greatest possible strength from a given quantity of materials, keeping in mind the direction in which the strain is to be borne. It afterwards says, that this is to be done by the use of that which is new, viz., by the stay introduced between the links, and which, instead of entering them, *557] embraces their sides. If that alone was to be done, it would be new; but the specification further goes on to say, "It is evident, that of all the forms and constructions that can be given to a link, that form and construction which shall be able to convert a lateral into an end strain, by yielding support to the opposite sides of the link, is the one that should be preferred." It appears to me, that the patentee here first claims the merit of originally using the links in the particular form described in his specification, instead of circular links.

Now there can be no doubt that links of that form had been used long before. Then as to the anchor, the invention claimed is, that he avoids the welding; but that certainly is not new, because that has been done before, in the case of the mushroom and adze anchor, the pick-axe, and the common hammer. It is said, however, that his invention consists in the application of that which was known before to a new subject matter, viz., that he had, for the first time, applied to the manufacturing of anchors, a mode in which welding was avoided, which however, had been long practised, in other instances to which I have before alluded; but he does not state that as the ground upon which he had applied for his patent, nor state in the specification, that it being known that the process of welding weakens the anchor, he had first applied to an anchor a mode long practised in the manufacture of other instruments, viz., of making the two flukes of one piece instead of two. If he had so described his process, the question would then arise, whether that would be a good ground for a patent. I incline to think, however, that it having been long known that welding may be avoided in instruments of a similar form, the application of that practice, for the first time, to a ship's anchor cannot be considered ^(a) a new invention, and, therefore, that it is not the ground of a patent. It is unnecessary, however, to decide that question in this case, because the patentee has claimed the mode of avoiding welding as a new discovery. That is not a new discovery, and he has therefore taken out his patent for more than he is entitled to; and I am of opinion, that that avoids the patent in *toto*. For the king is deceived; the patentee is represented to have the merit of inventing two things, whereas he has discovered only one; and the crown might have considered the discovery, as to both, a sufficient ground for granting a patent, when it would not have thought so of the discovery of one alone. This has been compared, in argument, to the case of a grant of lands. If in the same deed, there were included three conveyances of three distinct estates on three considerations, one might be set aside and another be good; but if the grant were upon one consideration which was bad, the whole would be void, because the consideration would fail altogether. Now the present case is similar to that, because here, the consideration to induce the king to grant the patent, was the statement made by the plaintiff in his petition, that there had been three inventions, when, in fact, there had been only two. The united consideration upon which the whole grant was made, is therefore void; and, consequently, the grant itself is void. I am therefore of opinion, that there ought to be a new trial.

Rule absolute. (a)

The *Solicitor-General*, *Gaselee*, *Stephen*, and *F. Pollock*, were to have argued in support of the rule.

(a) See *Arthur Leggatt's case*, 10 Co. Rep. 109.

WELLS v. MILES and Another.

[^{*559}

A prescription for toll of corn brought into a town to be sold on a market-day there, whereof any part is pitched within the market for sale, and which shall be there sold, is bad, inasmuch as there cannot be any toll in respect of goods not actually brought into the market.

TRESPASS for taking and carrying away plaintiff's wheat. Plea, that the Marquis of Buckingham was seized of the manor of Aylesbury with Bierton, in the county of Buckingham, in fee, and that he, and all those whose estate he had in the manor from time immemorial, had been used to hold, at the town of Aylesbury, on every Saturday throughout the year, a market for the buying and selling of corn, grain, &c., usually sold at markets, as to the said manor belonging, and that the said Marquis, and all those, whose estate, &c., from time immemorial, had taken a certain reasonable toll of all common grain, &c., brought to the said town of Aylesbury, to be sold on any market day there,

whereof any part was pitched within the said market for sale, and which said common grain, &c., should be there sold on the market day, subject to certain exceptions therein set forth. It then stated, that the marquis, on, &c., demised by indenture unto the defendant, the tolls payable at the market for one year, by virtue of *which said indenture the defendant entered upon, and took the said toll so demised, and was lawfully possessed thereof.* It further alleged, that on, &c., the plaintiff brought into the *said town of Aylesbury*, for the purpose of being sold *there*, a quantity of wheat, and did then and there pitch a part thereof, that is to say, one sack thereof respectively within the said market for sale, the residue of the wheat being deposited within the town of Aylesbury, and which quantity of wheat was then sold upon the market-day, at the market.

*560] By reason whereof, *the defendant was entitled to take from the said wheat, the tolls so due and payable, and so justified the taking of the wheat in question, as the toll. Replication denied the prescription stated in the plea, upon which issue was joined. The cause was tried before HOLROYD, J., at the Buckingham Summer assizes, 1820, and the jury found a verdict for the defendant. A rule nisi for entering judgment for the plaintiff, non obstante veredicto,* having been obtained by *Blosset, Serjt.*, in last Michaelmas term,

Tindal now showed cause against the rule. The jury having found that the prescription stated in the plea was proved in fact, the burden of showing it to be bad in point of law, lies on the plaintiff. In the *Terms de la Ley*, toll, or tolne, is defined to be a "payment used in *cities, towns, markets, and fairs*, for goods and cattle brought thither to be bought and sold; and is always to be paid by the buyer, and not by the seller, except there be some custom otherwise." And Lord COKE, in 2 Inst. 220, defines it to be "a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the fair or market, or for stallage, picage, or the like." The place, the time, the sale of the goods, and the payment by the buyer, are therefore the essential characteristics of toll, and the toll claimed in this plea answers the definition in all these points. First as to place; the place is substantially *the town* in which the market or fair is held, for where no precise limits are fixed, the market and town are co-extensive. Lord COKE, in 2 Inst. 220, after citing from the *Mirror*, "negociator in vulgo si quid mercatus fuerit in eam rem testimonia habeto;

*561] nemo *extra oppidum, nisi praesente preposito aliisive fide dignis hominibus, quicquam emito;" and from another part of the same, "Ne quis extra oppidum quid emat;" says, "in these laws, *oppidum* is taken for *fair or market.*" In *Curwen v. Salkeld*, 3 East, 538, it was expressly held that the lord of a manor, to whom the grant of a market was made *infra villam de W.* &c., whether villa extend to the town of W. or to the township or parish of W. "has a right to remove the market place from one situation to another within the precinct of his grant." Besides these express authorities, it is evident from analogy to all the rules which relate to sales in market overt, that the market itself is not confined to any precise limits. In 2 Inst. 713, it is laid down, that the sale must be made in a place that is overt and open, not in a back room, warehouse, &c., and the same rule is laid down in 5 Co. 83. That was the case of plate stolen, and sold openly in a scrivener's shop on market day, as every day is market day in London except Sunday, in which it was held, that such sale does not change the property; and after stating the law as to London, Lord COKE adds, "Note, reader, the reason of this case extends to all markets overt in England." Now the very exception of a back room or warehouse in the Institute clearly implies, that the sale may be made in every other part of the town where the shops are open, and proves consequently, that the market is not limited by law to any particular part of the town. In *Dixon v. Robinson*, 3 Mod. 107, where the issue was, whether the bailiff, &c., of Andover had power to keep a fair at Wayhill in any one place where they pleased,

* [See Yelv. 24, note, (Metcalfe's ed.); Wightwick's Rep. 354; 3 B. & A. 711.]

the chief justice is reported to have said, "If the place be not *limited by the king's grant, they may keep it where they please, or rather [562 where they can most conveniently; and if it be so limited, they may keep it in what part of such place they will;" and in *Curwen v. Salkeld*, it was expressly held, that after a formal removal of the market, persons who brought goods to the spot from which the market had been removed would be trespassers; but still, while the lord permitted it, the whole town might be the market. It would indeed be absurd to say, that a sale is not to be considered as having been made within the market, because, on the particular occasion, there were more cattle or goods brought to market than could stand within the limits of the market-place. *Kerby v. Whichelow*, 2 Lutw. 1498, however, is an express authority to show, that corn brought into *the town* to be sold at the market, is to be considered as if it were brought into the market itself. That was trespass for taking three bushels of corn at Wallingford. The plea stated a grant by Car. 2, to the mayor, &c., of Wallingford of a market, and that "the mayor should have toll of all corn brought, sold, or delivered, or contracted for, on the market days." Without alleging in the prescription that the corn should be brought *within the market*, the plea then stated, that one J. F. brought into the said town (*ad villam illam*) five quarters of barley, to be there sold, and sold it to the plaintiff, and that the defendants took the toll. Replication, that the five quarters of barley were not sold within the market. Demurrer. And judgment was given for the plaintiff, on the ground that no place was alleged where the barley was sold. The defendant's counsel argued, *that it must be [563 intended that it was sold at Wallingford, for the prescription was alleged to be at Wallingford, the barley was taken to Wallingford, and sold on the same day; and, therefore, it must have been sold there. Judgment, nevertheless, was given for the plaintiff, *Powell*, J., saying, that the king could not grant a toll for things not brought into the market to be sold, and that the *villa* in that case should be taken for the *market*. This, therefore, is a strong authority to show, that the whole town may be considered the market. The second essential characteristic of toll is the time. Now, in this case, the plea states, that the corn was both brought into the town and sold on a market-day. Thirdly, as to the sale. The authorities are decisive that toll is not due until the thing is sold. *Leight v. Pym*, 2 Lutw. 1331. Here there is an express allegation of an actual sale, and the toll is in fact paid by the buyer, for it is taken out of the bulk. A decision in this case, in favour of the defendants, will not be inconsistent with any decided case. *Blakey v. Dimsdale*, Cowper, 861, is an authority only to show, that a distress cannot be taken for goods fraudulently sold *out* of the market to avoid the toll; but that the party injured must bring a special action on the case. There Cooper, on a market-day, sold to Blakey, at his house in Ripon, thirty-two bushels of wheat, which were at Cooper's house, ten miles out of the borough of Ripon, to be delivered within a month: within the month the corn was sent, on a market-day, to the plaintiff's house at Ripon, and the toll taken when it had got to Blakey's house. In that case the corn was never brought into the town to be sold; and, therefore, *there was [564 no pretence for saying that toll was due. In *Hill v. Smith*, 4 Taunt, 520, it was held, that a prescription for toll in respect of goods sold by *sample*, and *afterwards* brought into the market cannot be supported, but that case turned expressly on the mode in which the prescription was alleged, viz. a sale by *sample*, which is of modern introduction, and not the subject of prescription. But this sale was not by sample, for the goods were brought into the market. The buyer and the seller had all the benefit of the market. This case, therefore, is distinguishable, for it is neither a sale by sample, nor so alleged. In *Moseley v. Pierson*, 4 T. R. 104, an allegation of claim for toll of goods sold in a market, was held to be supported by proof that toll was taken, and goods brought into the market and sold there. It is of great service, not only to the

owner of the market, but to the public, that the remedy by distress should be supported, as it avoids a multiplicity of actions. And as the prescription set out in the plea does not break in upon any decided case, and has been found to have existed in point of fact, judgment ought to be for the defendant.

ABBOTT, C. J. I think that the rule for entering judgment for the plaintiff, non obstante veredicto must be made absolute. The question raised upon the pleadings has in fact been decided by the opinion of POWELL, Justice, in the case of *Kerby v. Whichelow*, 2 Lutw. 1498, and the late case of *Hill v. Smith*, 4 Taunt, 520, in the Exchequer Chamber. According to those authorities, toll can only be taken in respect of things actually brought into the *market*, and [565] there sold. *It is not necessary here to decide, whether in any case the whole town may be considered as a market, because the plea in this case does distinguish the market from the town. It speaks of the town as the place of which the whole quantity of goods are brought, and it speaks of the market as the place where a portion of the goods only are pitched for sale. On the face of the plea, that portion may be a mere sample, a small quantity which a man may take from his pocket and place on the ground in the market-place. The plea, therefore, having distinguished the town from the market, it appears to me, that the defendant claims a toll for goods not brought into the market for sale, and that being so, then according to the authorities to which I have already referred, that claim cannot be sustained in point of law. The plea, therefore is bad, and this rule must be made absolute.

HOLROYD, J. I am of the same opinion. Upon this plea, it cannot be considered that the whole of the corn was brought into the market, for it expressly states, that the whole was brought into the town, and that only part was brought into the market; the plea therefore, distinguishes between the town and the market. In order to make it a valid plea, it should have stated, that the whole of the goods were brought into the market. In *Hill v. Smith*, the precise point decided was, that a prescription in respect of goods sold by sample in a market, and afterwards brought into the city to be delivered, could not be supported. The foundation of the judgment in that case was, that toll was not due in respect of goods not brought into the market. Lord Chief Justice MANSFIELD [566] says, "The sale by sample has no connection with the market; the corn so sold is never brought into the market; and if toll might be demanded for corn so sold, I cannot see why it might not be demanded for any sale whatever contracted for in a market; for the sample is only used to show the quality of the thing sold." And after observing on the nature of a sale by sample, he says, "The corn is not sold in the market, and the toll to be paid for a sale in a market, is for corn brought into the market and there sold." And then, after citing the 2 Inst. 220, and 2 Inst. 713, and stating that, the sale by sample is directly contrary to the origin and purposes of markets, he says, "In *Moseley v. Pierson*, the court said, that the very words, 'sold in a market,' implied that the thing must be in the market." He then says, "No particular case has been cited, in which there has been an exact decision that toll shall not be taken for goods not brought into a market; but in Lutw. 1502, POWELL, J., said, that the king could not grant a toll of things not brought into the market; and Lord Chief Baron COXVNS, in title *Market*, adopts the doctrine of POWELL. All the doctrine of sales in market overt militates against any idea of a sale by sample, for a sale in market overt requires that the commodity should be openly sold and delivered in the market; and Lord COKE so says in his 5 Rep. 82, and that every part of both the treaty and completing of the sale must be in the market overt." The reasoning of Lord Chief Justice MANSFIELD, in *Hill v. Smith*, was, that no toll could be due upon a sale by sample, because no toll was due at common law for goods not brought into market. That case is an authority to show, that no toll was due in this case, for the corn

which is alleged in the plea to have been brought into the *town only, and not into the market. I think therefore that this rule must be made [*567 absolute.

BEST, J. I am of the same opinion. In the case of *Hill v. Smith*, which has been so fully commented upon by my brother HOLROYD, it was decided, that toll is not due, except for property actually brought within the market. Now upon this plea, it is perfectly clear, that only part of the property was brought into the market, and the remainder was kept without the market, and sold without the market. If the distress were taken in respect of corn sold without the market, for which no toll was due, it cannot be supported. The cases referred to in argument only show, that a market and town may be co-extensive, and that unless the lord of the market is limited to hold his market in some particular place in the town, he may hold it in any part of the town he pleases; but they do not show that he will then have a right to claim toll for goods in that part of the town which is not a market. Those cases, therefore, are not in point; for the question here is, not whether the Marquis of Buckingham had a right to appoint a particular place as the market, but whether the whole of the corn was brought into the market. It is stated in the plea, that part of the corn was out of the market, and that being so, I am of opinion that the plea cannot be supported, and, consequently, that this rule must be made absolute.

Blossett, Serjt., Storks, and *Dover* were to have argued in support of the rule.

Rule absolute.(a)

(a) Bayley, J., was absent.

*BEALE, surviving Partner of LONG, v. NIND.

[*568]

A party, on being asked for the payment of his attorney's bill, admitted that there had been such a bill; but stated that it had been paid to the deceased partner of the attorney, who had retained the amount out of a floating balance in his hands. Quære, whether, in order to take the case out of the statute of limitations, evidence is admissible to show that the bill had never in fact been paid in this manner.

Sensible, that such evidence is admissible, if at all, only where the defendant states the debt to be discharged by particular means, to which he refers with precision, and where he has designated the time and mode so strictly that it is impossible it could be discharged in any other manner than that specified.

ASSUMPSIT by plaintiff, as surviving partner of Long, deceased, for work and labour as attorneys and solicitors. Plea first, non-assumpsit; 2dly, non-assumpsit infra sex annos; 3dly, set off. At the trial, before RICHARDSON, J., at the Worcester summer assizes, 1820, it appeared that the action was brought by the plaintiff, as surviving partner of Long, to recover £232., the amount of their bill for business done from January, 1810, to the 28th of April, 1812. Beale and Long dissolved partnership at the end of 1812, and Long died in 1817. To take the case out of the statute of limitations, it was proved that in June, 1819, the defendant came to Beale's office, when the latter said, "Mr. Nind, I believe there is a bill due from you to Long and Beale." Nind said, "He believed there had been a bill, but that they had received the money, and that there was a balance due to him from Long's executors." Long was also a partner in a banking concern, but Beale had nothing to do with that. At a subsequent meeting Beale said to Nind, "If you have paid this bill to Long and Beale, I have received no account of it, and I shall not be satisfied till you show me the receipt, and I shall proceed." Nind said, Long had always a floating balance in hands, and that he had paid himself. The plaintiff called a clerk of the banking-house in which Long was concerned, who proved the state of the accounts between Nind and Long for three years previous to March,

*509] 1812. Nind *had a private account with Long, and Long had received money of Nind on account of the sale of an estate, and on the 9th of July, 1811, the account was settled, and Nind was paid the balance to that time. Afterwards 2500*l.* was paid in on account of Nind, which he drew out. The bill of Long and Beale, for business done, was never brought into the banking account, and the balance was finally against Nind. On the part of the defendant, evidence was given of payments made to Long in 1810 and 1811, one of which only, viz., 2500*l.*, was subsequently to the 9th July, when the accounts were settled. The learned judge told the jury, that if the conversation of the defendant referred to the private account with Long, and there was no other account with him than that produced, the defendant appeared to be mistaken in supposing that the balance was in his favour; and he left it to the jury to consider, whether the plaintiff's demand was satisfied by payment or set-off, and the jury found a verdict for the defendant. A rule nisi having been obtained in last Michaelmas term, on the ground that this was a verdict against evidence,

Jervis and *Puller* now showed cause. In *Swann v. Sowell*, 2 B. & A. 759, it was expressly held, upon a plaintiff's showing the defendant a promissory note within six years, and the latter saying, "You owe me more money, I have a set-off against it," that that was not sufficient to take the case out of the statute. Although *Best*, J., differed from the rest of the court, yet he said, that

*570] "if the witness had said that the defendant had acknowledged *that the debt once existed, but added that it was paid, he should have nonsuited the plaintiff; because payment destroys the original debt, and may be given in evidence under the general issue; but a set-off does not destroy the original debt, and cannot be given in evidence without a plea or a notice of set-off." Here, the defendant said that the debt had been paid, and besides, there is a plea of set-off. That case is, therefore, expressly in point, and the plaintiff here ought not to have been permitted to contradict a part of the defendant's statement. Besides, in this case, the defendant alleged, that Long had paid himself out of a floating balance in his hands. The plaintiff's evidence only went to show, that he had not paid himself previous to 1812, and there is no evidence as to what took place at a subsequent period.

W. E. Taunton and *Campbell*, contrâ. The defendant has admitted, that the debt once existed, and has added, that it was discharged by a particular mode of payment. Then it was competent to the plaintiff to show, that it was not so discharged, according to the opinion of *Gibbs*, C. J., in *Hellings v. Shaw*, 7 Taunt. 808. The defendant alleged that Long had paid himself out of a floating balance in his hands. It was expressly proved, that the account between Long and Nind had been settled in 1811, and that this bill had never been brought into the account.

Abbott, C. J. I am by no means satisfied upon proof of the conversation held with the defendant, that it was competent to the plaintiff to go into the whole of *the accounts between Long and the defendant, to falsify what *571] the latter said. Admitting, however, that that could be done, it is not made out to my satisfaction, that the defendant's assertion, that this matter had been settled between Long and him, was untrue; and I cannot therefore say, that the jury have come to a wrong conclusion. The rule must therefore be discharged.

Bayley, J. The onus of taking a case out of the statute of limitations is upon the plaintiff. In order to do so in this case, he proves a conversation, which perhaps is the worst description of evidence upon such a subject. The substance of it is, that although there was once a debt, yet that debt had been discharged by the fact of Long, the deceased partner, having paid himself, out of money in his hands belonging to Nind. It is contended, that the plaintiff has a right to falsify that allegation of the defendant; and that by so doing, there remains an acknowledgment of a debt, which is an answer to the statute

of limitations. The only authority applicable to this point, is certainly a very great authority, viz., that of Lord Chief Justice GIBBS, in the case of *Helling v. Shaw*, 7 Taunt. 612. After lamenting that the courts have not confined themselves to the words of the statute, he proceeds thus : " There are three cases in which the words of the statute would discharge the defendant, but in which the courts have held him liable. One is where the defendant has admitted, that the debt is unpaid, but has stated that it was discharged by the lapse of time : another is, where the defendant has stated, not that the debt remained due, but that it is discharged by a particular means to which he has *with precision referred himself, and where he has designated that *time* and *mode* so strictly, that the court can say it is impossible it had been discharged in any other mode : there the courts have said, that if the plaintiff can disprove that mode, he lets himself in to recover, by striking from under the defendant the only ground on which he professes to rely." (a) I certainly am not aware of the cases to which my Lord Chief Justice GIBBS refers to support that proposition ; but admitting that proposition to be true, I think that this case does not fall within it. The defendant here has not stated that the debt was discharged by particular means, to which he has with precision referred. He has not designated the time and mode so strictly that the court must say it is impossible it can have been discharged in any other mode. The defendant has only stated, that Long had paid himself out of a floating balance in his hands. It is not stated either when he paid himself, or when the floating balance was in his hands. It is said that the allegation that Long had paid himself out of the floating balance is false, because in fact he had not paid himself out of that floating balance which was in his hands up to March, 1812. It is not inconsistent with Nind's declaration, that subsequently to March, 1812, he had money in Long's hands, or that Long had paid himself after that period. I am aware that the partnership between Long and Beale was dissolved in March, 1812, but a payment on account of the partnership to either party after that period would be a payment to both ; and I am strongly inclined to believe that this debt was paid by Nind to Long, and that Beale knew it ; for it appears in evidence that "Long was the person with whom Nind was in the habit of transacting his business. Beale and Long were at variance with each other ; but unless the latter had stated to Beale that Nind had paid him the money, I think it probable that Beale would not have suffered so large a sum as 32*l.* to have been outstanding in the hand of the defendant for so long a period.

HOLROYD, J. I think that, after the declaration of the defendant, the evidence given was not sufficient to take this case out of the statute of limitations. Admitting that the proof given by the plaintiff is admissible in evidence, still the defendant alleges that payment had been made of his bill to Long, by the latter retaining the amount out of a floating balance which had been in his hands. Now the assertion of his having paid it is not inconsistent with the evidence, for he might have paid the balance due on the bill without having it entered into any account at all. If the defendant Nind had said, " Long has paid himself,

(a) But see the judgment of Gibbs, C. J., as reported in 1 B. Moore, 344, where he confines his observation to the case of a defendant claiming his discharge under a *written instrument*, to which he with precision refers.

* [The case of *Partington v. Butcher*, decided by Sir James Mansfield in 1806, fully supports Lord C. J. Gibbs' proposition as stated in Moore's report of *Helling v. Shaw*.

The defendant admitted the receipt of the money sued for, and that it was unpaid ; but said he should not pay it because the creditor had excused him from payment by a memorandum which he offered in evidence to support his defence. Mansfield, C. J., said—" The defendant does not insist on an absolute discharge, but *sub modo* only, by reference to a memorandum ; if that does not discharge him, he admits that the debt has existence. Where a party claims a discharge, as arising under a *written instrument*, as he has done ; though he has a right to have his whole admission taken together, the court have the same right, and will see whether that instrument so referred to, affords him a legal discharge or not : By reference to it, it will be found not to be so ; it is not a legal discharge. This therefore appears to me to be an admission sufficient to take the case out of the statute, and that the plaintiff is entitled to recover." 6 Esp. Rep. 68.

and you will find an item of that payment in the account at the bank," then, supposing this proof to be admissible (with respect to which I give no opinion,) and that it had been proved that no such item was in that account, it would have falsified the statement which Nind had given, and left the rest of the evidence as true ; and then the question would arise, whether the case was taken out of the statute of limitations. There is, however, no evidence to disprove the truth of any thing he stated. I think, therefore, that there ought not to be a new trial.

BEST, J. I am clearly of opinion that there is not sufficient evidence in [See 10 Johns. Rep. 35, *Dean v. Pitts*; 11 ib. 146, *Danforth v. Culver*; 13 ib. 288, *Lawrence v. Hopkins*; 15 ib. 511, *Sands v. Gelston*; 8 Cranch, 72, *Clementson v. Williams*; 1 Serg. & Rawle, 179, *Brown v. Campbell*.] this case to negative the *fact alleged by the defendant. The declaration is not, as it is supposed to be, an assertion that the money was paid into the banking account ; but, generally, that although there was a bill, it had been paid. It might have been paid in any other mode than through the medium of a banker. Now, here, if the declaration could be falsified at all, it must be falsified by clear and precise evidence ; but the evidence only goes to show that there was not any payment of it entered in the banking account. That does not by any means establish that Long might not have retained some of Nind's money, and not have entered it in that account. I think, therefore, that there ought not to be a new trial.

Rule discharged.*

* [See 10 Johns. Rep. 35, *Dean v. Pitts*; 11 ib. 146, *Danforth v. Culver*; 13 ib. 288, *Lawrence v. Hopkins*; 15 ib. 511, *Sands v. Gelston*; 8 Cranch, 72, *Clementson v. Williams*; 1 Serg. & Rawle, 179, *Brown v. Campbell*.]

WRIGHT v. STEPHENS.

Where a testator bequeathed all his houses and premises in W. to his wife, for life ; and, at her decease, to go to his eldest son, or surviving sons ; and, in lack of sons, to daughters ; and his copyhold land at L. to his eldest son ; and, in case of his decease, to the eldest, and so on in rotation ; and, in lack of sons, to daughters ; and directed his personal property to be equally divided among the remaining children : Held, that the son, who, at the death of the testator, was the eldest, under the will, and as heir at law, took a fee in the premises at W., subject to his mother's life estate, and a fee in the copyhold land at L.

THE master of the rolls sent the following case for the opinion of this court. Thomas Stephens duly made, signed, and published his will, which was duly attested by three witnesses, and of which the following is a copy. " This is the last will and testament of Thomas Stephens, of Tynemouth, in the county of Northumberland, ship-owner. I bequeath to my dear beloved wife, all those houses and premises in the township of Whitley, with all plate and furniture ; 100*l.* per annum for her life, and, at her decease, to go to my eldest son or surviving sons ; and in lack of sons, to daughters : To my eldest son, Charles, houses at Cullercoats ; and in case of his decease, to the eldest, and so on in rotation ; and in lack of sons, to daughters. All my shipping, and other money proper, are to be equally divided, share and share alike, among the remaining children, to be paid them when they arrive at the age of 21 years, share and share alike, their mother to have the bringing of them up, until they arrive at maturity ; I allow for the same. I appoint for my executors, D. S., of London, J. C., of Tynemouth, and Z. S., of Whitley ; and *the said Jane Stephens*." The copyholds were duly surrendered to the use of the will. The testator died, leaving Jane Stephens, his widow, and Charles Rutherford Stephens, his eldest son and heir at law, and also his customary heir. The question was, what estate or interest Charles Rutherford Stephens, the eldest son and heir at law, and customary heir of the testator, took under his will, or as heir at law or customary heir, in the copyhold houses and premises in the township of Whitley, and the copyhold lands at the Links respectively. The case was argued in last Easter term, by

Hone, for the plaintiff. There are two sets of limitations in this will, one with respect to the houses at Whitley, the other to the lands at the Links. The court must, in this case look at the whole will, inasmuch as the objects of the testator's bounty, in reference to his personal property, are called "the remaining children," but whether those remaining children were intended to consist of sons and daughters, or daughters only, cannot be discovered, till the court points out those who are to take under the previous devises of the realty. The testator first devises to his wife for life, and after her "death, to his eldest son or surviving sons; and in lack of sons, to daughters." This is as to the houses at Whitley. Then, as to the lands at the Links, he devises them first to his eldest son, Charles, and in case of his decease, to the eldest, and so on in rotation; and in lack of sons, to daughters. The difficulty arises from the introduction of the words "eldest son or" in the devise of the Whitley premises. If those words are rejected, the whole will is rendered intelligible, and the ambiguity which otherwise occurs as to the personality, will be avoided, by giving *all* the sons a vested interest as joint-tenants for life, for there are not any words of limitation or inheritance added to the devise of this or the Links property. If, however, the court should consider, that no incongruity arises by retaining the words "eldest son or," then the limitation over to the eldest son or surviving sons, will be a contingent remainder in favour of the eldest, if living at the death of his mother, or if dead, then of such other sons as may survive their mother and eldest brother; and this being copyhold, the contingent remainder cannot be destroyed by the act of the particular tenant and the reversioner. As to the land at the Links, it is clear the testator meant that all his sons should take for life in succession. *Lord Douglas v. Chalmer*, 2 Ves. jun. 501, is an authority to show, that the words "in case of his decease," are to be considered as tantamount to "at, or from his decease;" and this case was recognised in *Webster v. Hales*, 8 Ves. 410. The result is, that the eldest son takes a vested interest for life, jointly with the other sons, in the houses at Whitley; and as to the lands at the Links, all "the sons take in succession for life." The reversion in fee as to each estate, is admitted to be in the eldest son. [577]

Sugden, contra, contended, that the heir at law took a fee in the houses, subject to the life-estate of his mother, and a fee in the lands at the Links. The gifts are substitutionary. The testator meant that the eldest son should take; but if he died before the testator, then that the next should be substituted for him. Then, at the testator's death, it would be finally decided, and the then eldest son would take the fee, and the other devises over would be altogether at an end. In construing a will, when the only question is to ascertain the intention of the testator, there is no case which says that there is any distinction between real and personal property. In *Forth v. Chapman*, 1 P. Wms. 663, the case turned on a settled rule of law. Here, the devise is both of personal and real property; and the authorities, as to the construction of such a will, with respect to personal property, are decisive. The words "in case of his decease," must mean, in case of his decease in the lifetime of the testator. *Lowfield v. Stoneham*, 2 Str. 1261; *Webster v. Hales*, 8 Ves. jun. 410; *Doe v. Sparrow*, 13 East, 359. These, therefore, are authorities to show, that the court ought, in this case, as to the real property also, to come to the same conclusion. The bequest to the remaining children is strong, to show what the testator's intention was; for it must be ascertained at his death who they were, and they must be the children who at that period remained, exclusively of the eldest son, who was to have the lands. But if it could be supposed, that the testator intended, that, after this, these children were also to take the lands in succession, it would interfere with this devise, and make it altogether unintelligible. Either, therefore, the eldest son takes a fee under the will, or he takes an estate for life under the will, with the reversion in fee, as heir at law; the

other gifts being substitutionary and at an end, on the event of his surviving his father.

Hone, in reply. As to *Lowfield v. Stoneham*, the only point stated by the books to have been ruled in that case is, that parol evidence cannot be admitted to contradict a will in which a testator's intention is clearly expressed. In *Webster v. Hales*, the master of the rolls distinguished the devise from *Lord Douglas v. Chalmer*. And although he determined the last bequest, which was in the same terms with that case, contrary to it, he did it only on the ground, that it was found in company with two prior devises which were clearly distinguishable. In the case of *Doe v. Sparrow*, there were other words, viz., "in case my son and daughter shall both be dead *at the time of my decease*," which were much relied on by the court in giving judgment. That case is, therefore, very distinguishable from the present, for here the testator expressly gives the Whitley premises over to his eldest son, or surviving sons, at the decease of the mother, thereby himself marking out the time at which the devise over was to take effect; and the decision in *Lord Douglas v. Chalmer* has put the construction contended for upon the words "in case of his decease" in the devise of the lands at the Links.

Cur. adv. vult.

*^{579]} The following certificate was afterwards sent.
The best opinion that we can form on so obscure a will is, that under the will and as heir at law, Charles Rutherford Stephens takes a fee in the copyhold houses and premises in the township of Whitley, subject to the life estate of his mother: and the copyhold lands at the Links in fee.

C. ABBOTT.
J. BAYLEY.
G. S. HOLROYD.
W. D. BEST.

BARKER v. RICHARDSON and Another.

Where lights had been enjoyed for more than twenty years contiguous to land, which within that period had been glebe land, but was conveyed to a purchaser under the 55 G. 3, c. 147, it was held that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed.

DECLARATION stated, that the plaintiff was lawfully possessed of a messuage and dwelling-house, with the appurtenances, in the city of Norwich, in which there were two ancient windows, through which the light and air ought to enter, for the convenient use and enjoyment thereof; yet that defendants, well knowing the premises, but contriving, &c., unlawfully and injuriously erected and raised a certain building, near to the said windows, by means whereof the premises of the plaintiff were darkened. Plea, not guilty. The cause was tried before DALLAS, C. J., at the Norwich Summer assizes, 1820, when the following facts were proved.

The plaintiff's windows had existed more than 20 years. The defendants had erected the building which occasioned the darkening of the plaintiff's windows upon their adjoining land, which had been glebe land, *belonging to the rectory of Saint Edmund, but within the last six years had been conveyed in exchange to one John Brereton, by the then rector, with the consent of the bishop and patron, under the authority of the 55 Geo. 3, c. 147, and by Brereton conveyed to defendants. It was objected, on the part of the defendants, that although, after an uninterrupted possession of an easement for 20 years, the law will, in ordinary cases, presume a grant, yet that rule extended only to those cases where the presumed grantor was capable of making a grant. In this case, the rector, who was a mere tenant for life, had no power to make such grant, and therefore length of time could not operate against him, who was not seized of any estate of inheritance. *Daniel v. North*, 11 East,

372; 2 Saund. 175, note (e); Rayner on Tithes, vol. ii. 548, were cited. DALLAS, C. J., directed the jury to find a verdict for the plaintiff, reserving liberty to the defendants to move to enter a nonsuit, if the court should be of opinion that 20 years' possession was not sufficient, under the circumstances of this case, to entitle the plaintiff to maintain this action. A rule nisi having been obtained by *Blosset*, Serjt., in last Michaelmas term,

Scarlett, Firth, Serjt., and Cooper, now showed cause. A grant is not necessary to entitle a man to build upon his own land. The right to light or water is acquired by use. If a mill had continued for 50 years erected upon water which passes through glebe land, the clergyman surely could not stop the water from running to the mill. In this case it might fairly be presumed, that "the house was built upon the site of an old house, existing before [*581] the restraining statutes, or before the land had been granted to the church." The case of *Daniel v. North* only decided, that a landlord is not to be precluded by presuming a grant against him, without evidence of his actual knowledge of the fact of the light having been put out, and enjoyed above 20 years during the occupation of the opposite premises by his tenant. A rector, too, is something more than a mere tenant for life, for he may maintain an action for waste, the gist of which is the injury done to the inheritance; Com. Dig. tit. *Waste*; and Lord Coke, Co. Litt. 341 a, even states it as a doubtful question, in whom the fee simple of the glebe is. Assuming, however, that the parson has not the fee simple of the glebe in him, yet, by the common law, he is invested with nearly all the powers of a tenant in fee, and he may well have the power of granting to persons the liberty to build upon the land adjoining to the glebe; and if the rector had such a power, it may be presumed, with respect to a building situated in the middle of a populous city, that he had exercised it in favour of those who had had the uninterrupted enjoyment of the light and air for 20 years.

ABBOTT, C. J. I am of opinion, that the rule for entering a nonsuit must be made absolute. The only point reserved for the opinion of this court is, in effect, whether a license, if presumed, would be valid in law. There was no evidence at the trial, from which the jury might presume that this was an ancient house, or built on the site of an ancient house, or that the window was "there before the adjoining land had been granted to the church, nor was [*582] that point ever made. Admitting that 20 years' uninterrupted possession of an easement is generally sufficient to raise a presumption of a grant, in this case, the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor; the grant, therefore, would be invalid, and consequently, the present plaintiff could derive no benefit from it, against those to whom the glebe has been sold. For the purchasers bought all the rights belonging to the land at the time of sale. I am therefore of opinion, that the evidence in this case was not sufficient to entitle the plaintiff to maintain this action. The rule, therefore, for entering a nonsuit must be made absolute.

Rule absolute.*

* [See Yelv. 216 a, in *notis*; 12 Mass. Rep. 159; 1 Price, 27; 11 Mod. 8; 1 Camp. 463.]

MANFIELD and Another v. MAITLAND.

Where the memorandum for charter stated one half of the freight to be paid in cash on unloading and right delivery, and the remainder by bill on London at four months' date; and then, after containing stipulations for unloading, discharging, demurrage, &c., added, "the captain to be supplied with cash for the ship's use;" and, in pursuance of the last stipulation, the master drew a bill on the freighters, which was duly accepted and paid: Held, that this was not to be considered as a payment of freight in advance, but as a loan to the owner of the ship, and that (the ship having been lost on her homeward voyage) the freighters had no insurable interest in such bill.

ASSUMPSIT on a policy of insurance on the ship *Agenoria*, and upon all kind of goods, &c. from Quebec to London. By a memorandum at the foot of the policy, the insurance was declared to be on a bill of exchange for 219*l.*, drawn by the master on plaintiffs, dated Quebec, 3d November, 1819. Plea general issue. The defendant paid the premium into court. At the trial at the Guildhall sittings after last Easter term, before **ABBOTT**, C. J., the facts appeared to be as follows. *By a memorandum of charter-party, dated 24th June, 1819, between Mr. John Rattenbury the owner and the plaintiffs, it was agreed that the ship should proceed from London to Quebec, and there take on board a cargo of deals, with staves for broken stowage, and with them proceed to Bridgewater, and deliver them on being paid freight for the deals, 10*l.* 5*s.* per hundred, per St. Petersburg standard hundred, and for the staves, 6*l.* per 1000, &c., one half of the freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by bill on London, at four months' date. Thirty running days to be allowed for loading and discharging, and ten days' demurrage at 4*l.* per day. Penalty for non-performance 800*l.* The captain to be supplied with cash for the ship's use. In pursuance of this last stipulation, the master drew the bill of exchange in question, for 219*l.*, value received, for the use of the ship *Agenoria*, on the plaintiffs, which was duly accepted and paid. The ship was lost in her homeward voyage. The lord chief justice was of opinion, that the plaintiffs had no insurable interest, and directed a nonsuit. And now

Campbell by leave moved to set aside this nonsuit, and to enter a verdict for the plaintiffs. The question here is, whether the plaintiffs had an insurable interest. Here the plaintiffs were the acceptors of the bill of exchange in question, which was duly paid by them at maturity. And this distinguishes the case from *Tasker v. Scott*, 6 *Taunt.* 234, where the insurance was effected by an endorsee of the bill. The real point is, whether this is to be considered as a loan to the owners of the ship, or as a part payment of the freight in advance. If the latter, then it is a mere insurance *on freight. Upon looking at the whole of this charter-party, it must be considered as substantially money advanced in anticipation of freight. The freight is to be paid one half in cash on unloading, and the remainder by a bill at four months, and then comes the clause, the captain to be supplied with cash for the ship's use. It does not even say where, or by whom, or on what terms he is to be supplied. The reasonable construction, however, is, that he is to be supplied by the charterer who was to deduct it from the freight due. In *De Silvale v. Kendall*, 4 M. & S. 37, a similar provision was made in the charter-party, and the money advanced was there held to be part of the freight. It is true indeed, that the provision is there in a different part of the charter-party, which was a formal instrument under seal. Here it is a very informal and loose memorandum for charter, and the mere alteration of the position of a clause in such an instrument ought not to have much weight. This then must be considered as freight, *Andrew v. Moorhouse*, 5 *Taunt.* 435, and then there is no doubt the plaintiffs had an insurable interest.

ABBOTT, C. J. The case of *De Silvale v. Kendall* turned upon the particular words of the instrument; by which it was provided, that the freight was to be paid as follows, viz.: One hundred and twenty pounds British sterling for freight of the outward cargo to Maranham, and as much cash as may be found necessary for the vessel's disbursements in Maranham, to be advanced by the freighter to the ship-owner when required, and the residue of such freight to be paid on delivery of the cargo in Liverpool. So that, in that case it appears, *that the instrument was studiously framed, so as to make the freighter lose the money advanced by him, unless the owner reaped the benefit by the ship's coming home safe. The present charter-party, however, is in a very different form. It is undoubtedly competent for the owner to make such a stipulation as that in *De Silvale v. Kendall*. But if he does so, it is his duty

to take care that it is inserted in clear and explicit words in the charter-party, that the money advanced shall be an advance in part payment of the freight. As there are no such words in this instrument, I cannot consider these advances as a part payment of the freight; for in so doing, I might be making a new contract between the owner and the freighter, to which the latter might object. These stipulations are by no means uncommon; for the owner of a ship frequently has no agent at the port of loading, but the freighter always has, and therefore, naturally enough, stipulates to advance money to the owner, which, upon the ship's safe arrival, is as naturally in practice deducted from the freight. There is, however, in this charter-party, a total absence of any expression implying that this money advanced shall be part of the freight. If so, the owner is liable for it to the freighter as for a debt, and the latter has not any insurable interest, and in that case the nonsuit is right.

BAYLEY, J. I am of the same opinion. If the memorandum of charter-party in this instance had clearly expressed, that the money advanced should be in part payment of the freight, then it would follow, that the loss of the ship would produce a loss of the money advanced to the freighter, and he would have an insurable *interest in it. But, if that be not so, and it be only a loan by the freighter, he would have no insurable interest, having a [*586 remedy against the owner for the debt. Now, if it had been the intention of the parties, that it should be a part payment of the freight, one would naturally have expected that the memorandum of charter-party would have been differently worded. The clause which speaks of these advances is altogether silent, as to the terms of the supply, or the person by whom it is to be made. In fact, it comes to no more than this, a stipulation that money shall be advanced to the captain for the ship's use. In the previous part of the instrument, there is an express stipulation as to the manner in which the freight is to be paid, but it is altogether silent as to any deduction for the advances from the freight. The stipulation is, that one half of the freight shall be paid in cash on unloading, and the remainder by a bill on London at four months' date. Now instead of this, there would have been added, "deducting thereout the money previously advanced," if such deduction had been intended to be made. It seems to me, therefore, that in the absence of any such stipulation, this was money to be advanced as a loan by the freighter, which he might, in case freight was afterwards earned, deduct from the freight, but for which, if no freight was earned, he had still his remedy over against the owner, and in that case it is admitted, he had no insurable interest.

HOLROYD, J. In this case, the money advanced was money paid by the freighter for the benefit of the owner, which would constitute a debt due from the owner. Now we ought not to construe this instrument so as to "alter [*587 this state of things, unless we can very clearly collect from it, that such was the intention of the parties, and as that cannot be done here, the nature of the supply and the rights of the parties ought to remain the same, whether the ship earns freight or not, and we cannot construe the instrument, as stipulating that the money advanced was to be deducted from the freight without making a new contract for the parties. It seems to me, that the case of *De Silvale v. Kendall* is directly against the plaintiff. There the parties agreed, that the freight should be paid in a particular manner, and the money advanced there, was stipulated to be part of the freight, and Lord ELLENBOROUGH's judgment proceeded on that ground, for he says, that it is competent for the parties to covenant by express stipulations, in such manner as to control the general operation of law, and he then puts the case, whether the parties had not so covenanted by the stipulations of the charter-party there, and the words of DAMPIER, J., are very strong, for, after stating that it had been argued from the words of the charter-party there, that as much cash as might be found necessary for the vessel's disbursements in Maranham, to be advanced by the plaintiff to the defend-

ant, imported a loan of money and not a payment of freight; he adds, "and if those words stood alone unexplained by the other part of the clause, I should have thought they might have been subject to such a construction." Now here they do stand alone and unexplained. That case therefore fortifies our decision in the present case. I think, therefore, the nonsuit was right.

Rule refused.(a)

(a) Best, J., was absent from indisposition.

*588] **DOE on the Demise of HALL and Another v. BENSON.**

Upon a parol demise, rent to take place from the following "Lady-day, evidence of the custom of the country is admissible to show that by "Lady-day" the parties meant "Old Lady-day."

EJECTMENT for certain premises at Weston, in the county of Lincoln. At the trial at the last Lincoln assizes, before the lord chief baron, it appeared that the defendant had hired the premises in question in December, 1818, at three guineas a year rent, to take place from the following Lady-day; the notice to quit was served on the 9th of October, 1819, to quit on the old Lady-day following: evidence was given to show, that the general custom of the country in reserving rents, was to reserve them from old Lady-day; the jury, under the direction of the lord chief baron, found a verdict for the lessors of the plaintiff. *Clarke*, in last Michaelmas term, having obtained a rule nisi for a new trial.

Reader (*Vaughan*, Serjt., was with him) showed cause, and contended that the custom of the country was properly admitted in evidence, to explain the original agreement. The expression, Lady-day, is ambiguous, it may mean either new Lady-day or old Lady-day, and he referred to *Furley dem. The Mayor of Canterbury v. Wood*, Runnington on Ejt. 112; 1 Esp. N. P. C. 198, S. C. In *Doe v. Lea*, 11 E. 312, the letting was by deed, which distinguishes that case from the present.

Clarke, contra. Lady-day is not an ambiguous expression, for ever since *589] the act of parliament for altering *the style, it has been fixed by law to mean the 25th of March, there was therefore no ground for admitting the evidence of the custom. If, indeed, the original agreement had been, that the rent should be reserved, "from Lady-day, according to the custom of the country," it would have been different.

ABBOTT, C. J. The real question in this case is, what the parties meant when they used the expression, Lady-day, in their original agreement; and whether we are at liberty to ascertain that by extrinsic evidence. In *Doe d. Spicer v. Lea*, the letting was by deed, and the rule of law is, that evidence is not admissible to explain a deed. Now reading the deed in that case, as lawyers, the court could not but consider Lady-day there as meaning new Lady-day. But in the *nisi prius* case of *Furley dem. Mayor of Canterbury v. Wood*, which was cited there, and not disapproved of, where the letting was by parol, evidence of the custom of the country was admitted by Lord KENYON. I think that was a correct decision; and I am therefore of opinion that, in this case also, the evidence of the custom of the country was properly admitted, and that the verdict was right.

BAYLEY, J. This is the case of a letting by parol, and the question is, what was the meaning of the parties, when they used the word Lady-day. In common parlance, it is an equivocal term, where, therefore, there is a custom in the country respecting it, I think it ought to be considered as used *prima facie* consistently with that custom. I think, therefore, that the evidence was receivable, and that the case was properly left to the jury.

***HOLROYD**, J. I am of the same opinion. The case of *Doe v. Lea* *590] was decided upon a principle of law, not applicable to this case. For there the letting was by deed, which is a solemn instrument, and therefore parol

evidence was inadmissible to explain the expression Lady-day, there used, even supposing that it was equivocal. But that principle does not apply to the present case, where the letting being by parol, the party is at liberty to explain the words used, by evidence of the custom of the country. The verdict therefore is right.

Rule discharged.

CROFT and Another v. ALISON.

Where the plaintiffs hired a chariot for the day, appointed the coachman, and furnished the horses: *Held*, that they were properly described as owners and proprietors of it, in a declaration against a defendant for an accident arising from his servant's negligence in driving against the chariot.

Held, also, that where defendant's servant wantonly, and not in order to execute his master's orders, strikes the plaintiffs' horses, and thereby produces the accident, his master is not liable; but where, in the course of his employment, he so strikes, although injudiciously, his master is liable.

THE declaration stated, that the plaintiffs were the owners and proprietors of a certain chariot, then lawfully being and standing in a certain public highway, and that the defendant was possessed of a certain coach and horses, under the care and government of a servant, who was then driving the same along the highway; and that the defendant, by his said servant, so carelessly and improperly drove, governed, and directed his said coach and horses, that, by the carelessness, negligence, and improper conduct of the defendant, by his servant, one of the fore-wheels of the coach struck, and damaged the said chariot. Plea, general issue. At the trial, it appeared that the plaintiffs, who were livery-stable keepers, had hired the chariot for the day of Messrs. Lambert *and Bryant, who were coachmakers. The plaintiffs furnished the horses, [*591 and appointed the coachman, and then let it out to an individual for the day. It was stated in evidence, that the cause of the accident arose from the defendant's coachman striking the plaintiffs' horses with his whip, in consequence of which they moved forward, and the chariot was overturned. At the time when the horses were struck, the two carriages were entangled. The lord chief justice, at the trial, left it to the jury to determine, whether the carriages had become entangled from the moving of the horses of the plaintiffs, which, previously to the accident, were standing still and without a driver, and he directed them to find for the defendant, in case they thought so, and that the whipping by the defendant's coachman was for the purpose of extricating himself from that situation. But he directed them to find for the plaintiffs, in case they were of opinion, that the entangling arose originally from the fault of the defendant's coachman. The jury found a verdict for the plaintiffs. And now

Scarlett moved for a new trial. First, the plaintiffs cannot properly be called the owners and proprietors of the chariot, having only hired it of the real proprietors for one day; and if any but the real proprietors can be so called, the individual actually using the carriage at the time, might be much more properly called so than the present plaintiffs. Secondly, the injury arose from the act of the defendant's coachman, in whipping the plaintiffs' horses; now that was a wanton act on his part, for which he himself, and not his master, would be liable; and the declaration which charges, that, by the carelessness, negligence, and improper conduct of the defendant's *servant, the accident happened, [*592 is not supported by the proof of a wanton act.

Per Curiam. As to the first point, it has never been supposed that a mere passenger in a carriage can be considered as the owner and proprietor, so as to be entitled to bring this action. The plaintiffs, however, are something more, for they have not only hired the chariot for the day, but have appointed the coachman and furnished the horses. They may, therefore, be considered, for the purposes of this declaration, as the owners and proprietors of the chariot *

* [See 13 Mass. Rep. 391, *Boynton v. Turner.*]

As to the second point, the distinction is this: if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment. The case, therefore, has been properly left to the jury.

Rule refused.(a)

(a) See *Macmanus v. Crickett*, 1 East, 106; [*Bowcher v. Noidstrom*, 1 Taunt. 568; *Nicholson v. Mounsey*, 15 East, 384.]

STURDY v. HENDERSON.

A promissory note, payable two months after sight, requires a stamp appropriated to a note payable more than 60 days after sight, or two months after date, date and sight not being in this case synonymous.

ASSUMPSIT upon a promissory note, dated July 7, 1818, for 400*l.*, payable two months after sight to S. B. J. or order. Plea, general issue. At the trial [before **ABBOTT**, C. J., at the last Guildhall sittings, the note, when produced, appeared to be upon a six shillings stamp. It was objected, that this was a promissory note for the payment of money at a time *exceeding two months after date, or sixty days after sight*, and that it required a stamp, of 8*s. 6d.* The learned judge, being of that opinion, directed a nonsuit. And now

Marryat, moved for a rule nisi to set this nonsuit aside. And he contended, that, in a promissory note like this, sight and date are synonymous, for no place is fixed upon in the note where it is to be presented for sight; and therefore the two months must be calculated from the date. If so, the stamp is quite sufficient; for although undoubtedly it is a note payable more than sixty days after sight, yet it is not payable more than two months after date.

Per Curiam. This is a note payable more than two months after date; for the two months after sight do not begin to run from the day of the date, but from the day of the note being presented for sight, and that is the practice in bank post bills. This rule, must, therefore, be refused.

Rule refused.

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*TENNANT v. MACKINTOSH.

Where a return cargo belonging to plaintiff had been consigned by the defendant to B. and W., *to be held at the orders of defendant*, who had a lien on it, and such cargo had been sold by B. and W., and the lien satisfied: *Held*, that the plaintiff could not consider B. and W. as defendant's agents, so as to entitle him to maintain money had and received against the defendant for the balance remaining in the hands of B. and W.

ASSUMPSIT. The declaration contained several special counts upon the contract between the parties; and also a count for money had and received. At the trial at the last Westminster sittings before **ABBOTT**, C. J., it appeared that the plaintiff had sent out goods to be sold by the defendant, at Calcutta, with directions to remit the proceeds either in specie, or in a return-cargo, the nature of which, and the prices to be given for the articles were particularly pointed out by a letter of instructions. The return-cargo, which was sent, did not correspond with these instructions, but the plaintiff did not repudiate it within a reasonable time. That question was left to the jury. It appeared, however, that the return-cargo had been consigned to Messrs. Blanchard and Wilson, who were desired to sell and to hold the proceeds to the order of Mackintosh, the latter having a lien upon the cargo to the amount of about 400*l.* Blanchard:

and Wilson accordingly sold the cargo, and paid thereout the money due to the defendant. The residue, amounting to 415*l.* remained in their hands, and was admitted to be due to the plaintiff. A verdict having been found for the defendant generally,

The *Solicitor-General* now moved to enter a verdict for the plaintiff, for the sum of 415*l.*, upon the count for money had and received; and he contended that the cargo having been consigned to Blanchard and Wilson, to be held by them at the orders of the defendant, they *must be considered as his [•595 agents, and then the money in their hands was, in point of law, money had and received by Mackintosh, to the use of the plaintiff.

Per Curiam. It does not appear from the circumstances in this case, that Blanchard and Wilson are so far identified with the defendant, as that the money in their hands can be considered as money had and received by the defendant. They are, in fact, the agents of both parties; of the defendant, for the purpose of protecting his lien upon the cargo, and of the plaintiff for the purpose of paying over the remainder of the proceeds after the defendant's lien has been satisfied. There is therefore no ground for entering a verdict for the plaintiff for 415*l.*, his remedy for that being against Blanchard and Wilson.

Rule refused.

SAUNDERS v. WAKEFIELD.

By the 4th section of statute of frauds, an agreement to pay the debt of another must, in order to give a cause of action, be in writing, and must contain the consideration for the promise as well as the promise itself, and parol evidence of the consideration is inadmissible.

DECLARATION stated, that a certain action had been commenced by the plaintiff against one William Pitman, in the Court of King's Bench, for the recovery of 15*l.*, the amount of a bill of exchange, drawn by the said W. Pitman, upon one Thomas Michmen, payable to the order of the plaintiff, and then due and unpaid; which action, at the time of the making of the promise of the defendant thereafter mentioned, was depending in the said court, whereof the defendant had notice; and thereupon, in consideration of the premises, *and that plaintiff, at the request of the defendant, would cease to [•596 prosecute the said action against the said W. Pitman, and would stay all further proceedings therein, defendant undertook to pay the plaintiff the amount of the bill of exchange. Averment, that plaintiff did cease to prosecute the said action, and had from thence ceased all further proceedings therein against the said W. Pitman, whereof the defendant had notice. Breach, that the defendant, although often requested, had not paid the bill of exchange. Plea, that the said promise, in the declaration mentioned, was a special promise for the debt of another person, to wit, the said W. Pitman, and that no agreement, in respect of or relating to the said supposed cause of action in the declaration mentioned, or any memorandum or note thereof, wherein the consideration for the said special promise was stated or shown, was in writing, or was signed by the defendant, or by any other person by him thereunto lawfully authorized. Replication, that an agreement in respect of and relating to the said cause of action in the declaration mentioned, and whereby the defendant engaged to pay the said bill of exchange, drawn by the said W. Pitman, in favour of the plaintiff as aforesaid, was in writing, and was signed by the said defendant, and was in the words following, that is to say, "Mr. Wakefield will engage to pay the bill drawn by Pitman, in favour of Stephen Saunders." To this there was a general demurrer and joinder.

Manning, in support of the demurrer. The question raised upon these pleadings, depends, in a great measure, on the case of *Wain v. Warlters*, 5 East, 10. But it is said, that *doubts have been entertained as to the authority of that case; and all the objections to it are collected together in [•597

Phillips v. Bateman, 16 East, 370. The first case there referred to, as overruling it, is *Ex parte Minet*, 14 Ves. 190, where, undoubtedly, the expressions used by the lord chancellor are strong. But in that case there was a consideration implied from the words of the instrument, viz., the lending of money in future, by Gurney and Co. So, in *Ex parte Gardom*, 15 Ves. 286, also, a consideration, viz., the furnishing twist to Tapp, is to be implied. *Stadt v. Lill*, 9 East, 348. In *Fowle v. Freeman*, 9 Ves. 351, and *Cotton v. Lee*, 2 Bro. Ch. Rep. 564, the whole contract appeared on the face of the written instrument; and in *Egerton v. Mathews*, 6 East, 307, the consideration also appeared in the written agreement. Now these are all the cases cited, as impeaching the authority of *Wain v. Warlters*, and it is clear, that in all of them there was a consideration for the promise stated in writing, as well as the promise itself. Those decisions cannot, therefore, be considered as overruling it. In *Gaunt v. Hill*, 1 Starkie, 10, Lord ELLENBOROUGH, at a subsequent period, considered its authority as valid. The real question is, whether the word agreement, in the 29 Car. 2, c. 3, s. 4, means only the promise of the party sought to be charged, or the whole contract on which he is liable. Now agreement cannot be considered as synonymous with promise. That appears from the interpretations given to it in Johnson's Dictionary, in none of which is the word "promise" found. And in Sheppard's Touchstone, 85, the consideration is expressly *mentioned, as an essential part of an agreement as well as the promise.
 *598] It would let in all the inconvenience intended to be prevented by the statute, if the consideration, which must be proved, could be lawfully proved by parol testimony, and was not required to be in writing. Besides the replication states an absolute promise to pay at all events, whereas the promise in the declaration is only conditional. It is therefore a departure.

Abraham, contrâ. This is not a departure, for it would be no variance at nisi prius, if the promise stated in the replication were given in evidence, as proof of the promise in the declaration, *Peacock v. Monk*, 1 Ves. sen. 127; *Rex v. Scammonden*, 3 T. R. 474. But admitting that the replication is a departure, and therefore bad, the plea in this case is insufficient; for it only states, that no agreement wherein the consideration for the promise was stated, was in writing, or was signed by the defendant. The plea, therefore, raises the question, whether the case of *Wain v. Warlters* was rightly decided. Now in *Ex parte Minet*, the lord chancellor expressly says, that that case is contradicted by a variety of authorities; and adds, that the undertaking of one man for the debt of another does not require a consideration moving between them. And the other cases which have been mentioned on the other side, are to the same purport, *Morris v. Stacy*, 1 Holt. N. P. C. 153; *Lyon v. Lamb*, Fell, Law of Merc. Guar. 239. In *Heniger v. Fogossa*, Plowden, Rep. 1, several species of agreements are defined, but in none of them is a consideration mentioned, as an essential or necessary *part without which an agreement cannot subsist.
 *599] In truth, an agreement is the assent of two minds to do a particular act; and in the statute of frauds, the word is used in its popular sense, and so it seems to have been considered by ABBOTT, C. J., in *Goodman v. Chase*, 1 B. & A. 300, where he puts the case of a promissory note in these words: "I hereby agree to pay the bearer 20l." There it is synonymous with the word promise. The word agreement, in the latter part of the 4th clause, is merely a word of reference to the former part, and the words to which it refers are "special promise." Here there is a promise in writing. In *Goodman v. Chase* also, the court entertained so much doubt as to the authority of *Wain v. Warlters*, that they ordered a second argument. That case, however, was finally decided on another point. The plea therefore is bad, and then the plaintiff, notwithstanding any defect in his replication, will be entitled to judgment.

ABBOTT, C. J. I am of opinion, in this case, that the plea is good, and that the replication is bad; I assent to the argument which has been pressed upon

us, that the word agreement, in the latter part of the 4th section of the statute of frauds, is to be construed to be a word of reference, and that it refers to words contained in the former part of the section. Now in the former part of the section, we find the words, special promise, agreement, contract, or sale. I read, therefore, the latter part of the clause, as if all those precedent words were incorporated in it, together with the word agreement, and then it would stand thus, "unless the agreement, *special promise, contract, or sale, upon [*600 which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed," &c. It is then to be considered, with reference to the common law, whether there can be an agreement, special promise, contract, or sale, which would be valid in law, unless a consideration appeared for it. Now, at common law, a promise to pay the debt of another, if made simply, and without a good consideration for it, would be void. So also a promise by an executor, to answer damages out of his own estate, would be void, if made without consideration. It is impossible to suppose, that the statute of frauds, which was intended to correct the common law, can apply to cases in which, at common law, when the promise was not writing, there was previously no remedy. Now, at common law, no action would lie, unless there was some specialty or peculiarity in the promise. It is impossible to conceive how there can be such specialty unless the consideration for the promise be stated. For it is the consideration which makes it a special promise. The consideration, therefore, must have been in the contemplation of the legislature, when they used the words special promise. If so, it will follow, that a party is not entitled to recover, unless the written agreement contain some specialty, which cannot be unless it contain the consideration for the promise. There must therefore be judgment for the defendant.

BAYLEY, J. I am of the same opinion. The object of this statute, which was a most useful act, was to prevent frauds and perjury, and it ought to be construed so as most effectually to accomplish that object. The fourth section contains several cases in which it is provided, *that no action shall be [*601 brought. One case is of a special promise by an executor, to answer damages out of his own estate; another of a special promise, to answer for the debt, default, or miscarriage of another person. Now, at common law, in order to make a person chargeable in such cases, there must be a special consideration for the promise, either moving to the party promising, or from the party in whose favour the promise is made. Then the statute provides, that a party shall not maintain an action in such cases, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and I think, therefore, that that memorandum must include a statement of the consideration for such agreement. A contrary decision would be most mischievous. For if we were to hold, that the consideration might be omitted in the written agreement, we should immediately let in fraud and perjury. The consideration may be either past or future; and if the written agreement contain only a promise to pay, the party who relies upon it may then introduce parol evidence of a consideration, which perhaps was never intended by the parties, and so a door would be open to fraud and perjury. Suppose the real consideration for the special promise is something in future to be done. If that be not reduced into writing, the plaintiff may state in his declaration a past consideration, and bring parol evidence to prove that fact. I find too, that the word "agreement" in this clause is coupled with "contracts of marriage, and for the sale of land;" now in those cases, it is clear that the consideration must be stated. For it would be a very insufficient agreement to say, "I agree to sell A. B. my lands" *without specifying the terms or the price; and if those could be supplied by parol evidence, we should let in all the mischief, [*602 against which the statute meant to guard, viz., of having important parts of the contract proved by parol evidence. Without therefore going beyond the words

of the clause applicable to this particular case, I think that they import, that there must be some specialty in the transaction, and that they mean, that the special promise should be in writing, incorporating in it its consideration, which alone makes it binding. This seems to me to be the result without any reference to authorities on the subject. But in addition to this, we have the unanimous opinion of this court in the case of *Wain v. Warlters*; a case which was well considered at the time by four most able judges. Upon principle and authority, therefore, I think that we ought to decide in favour of the defendant.

HOLROYD, J. I am of the same opinion. Whether we consider the general object of the statute, or the particular object of the fourth clause, it seems to me to be necessary, that the consideration for the promise should be stated in writing. The consideration is the very ground of the action, and without it the action will not lie. In the present case, that which is reduced into writing, affords of itself no ground of action. The general object of the statute was, to take away the temptation to commit fraud by perjury in important matters, by making it requisite in such cases for the parties to commit the circumstances to writing. The particular object of the fourth clause was, to prevent any action being brought in certain cases, unless there was a memorandum in writing.

*603] The object of both *was, that the ground and foundation of the action should be in writing, and should not depend on parol testimony. Unless, therefore, what is sufficient to maintain the action be in writing, no action can be supported. If we take the word "agreement" used in the fourth section in its strict sense, it would seem to imply, that the whole of that which is agreed between the parties should be in writing, and the other cases mentioned in the clause support such a construction. For upon an agreement upon consideration of marriage, or a contract for the sale of lands, it is quite clear, that the consideration must be stated in writing. But whether we construe the word in this strict sense or not, still, inasmuch as without a consideration there can be no ground of action, it seems to me, that, upon this clause, the consideration must be stated in writing. In the present case, that which is reduced into writing is merely an engagement to pay the bill. Now, unless there be a consideration for that, no action lies upon such a promise. If a consideration is to be introduced, it may be either past or future, and must be proved by parol evidence. If that were allowed, all the danger which the statute of frauds was intended to prevent, would be again introduced. I am therefore of opinion, that there must be judgment for the defendant.

BEST, J. I am of opinion that the plea is good, and that the replication is a departure from the declaration. The contract stated in the declaration is, that, in consideration that the plaintiff would forbear to prosecute an action against Pitman on a bill of exchange, defendant promised to pay the bill, to which the defendant having pleaded that such promise was not in writing, *the replication sets out the agreement itself, which is an absolute promise to pay the bill at all events, omitting altogether any mention of the consideration, which was the forbearance to sue. Now if the cause had gone down to trial on the general issue, and the written promise set out in the replication had been produced, it would have been a variance from the contract stated in the declaration. If so, it is a departure in pleading. It has, however, been contended, that the plaintiff may introduce the consideration by parol evidence; but the rule is, that a party cannot by parol evidence show that the contract is different from that reduced into writing, and here the introduction of the consideration by parol evidence would do that. For no two things can be more unlike than an absolute and conditional promise. I am of opinion, therefore, that no such parol evidence could have been received, and if so, the replication is bad. Then the question is, whether the plea is good, and I think that it is so, independently of the authority of *Wain v. Warlters*. For it appears to me impossible to satisfy the words of the statute of frauds, unless the consideration be

us, that the word agreement, in the latter part of the 4th section of the statute of frauds, is to be construed to be a word of reference, and that it refers to words contained in the former part of the section. Now in the former part of the section, we find the words, special promise, agreement, contract, or sale. I read, therefore, the latter part of the clause, as if all those precedent words were incorporated in it, together with the word agreement, and then it would stand thus, "unless the agreement, *special promise, contract, or sale, upon [*600 which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed," &c. It is then to be considered, with reference to the common law, whether there can be an agreement, special promise, contract, or sale, which would be valid in law, unless a consideration appeared for it. Now, at common law, a promise to pay the debt of another, if made simply, and without a good consideration for it, would be void. So also a promise by an executor, to answer damages out of his own estate, would be void, if made without consideration. It is impossible to suppose, that the statute of frauds, which was intended to correct the common law, can apply to cases in which, at common law, when the promise was not writing, there was previously no remedy. Now, at common law, no action would lie, unless there was some specialty or peculiarity in the promise. It is impossible to conceive how there can be such specialty unless the consideration for the promise be stated. For it is the consideration which makes it a special promise. The consideration, therefore, must have been in the contemplation of the legislature, when they used the words special promise. If so, it will follow, that a party is not entitled to recover, unless the written agreement contain some specialty, which cannot be unless it contain the consideration for the promise. There must therefore be judgment for the defendant.

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of the clause applicable to this particular case, I think that they import, that there must be some specialty in the transaction, and that they mean, that the special promise should be in writing, incorporating in it its consideration, which alone makes it binding. This seems to me to be the result without any reference to authorities on the subject. But in addition to this, we have the unanimous opinion of this court in the case of *Wain v. Warlters*; a case which was well considered at the time by four most able judges. Upon principle and authority, therefore, I think that we ought to decide in favour of the defendant.

HOLROYD, J. I am of the same opinion. Whether we consider the general object of the statute, or the particular object of the fourth clause, it seems to me to be necessary, that the consideration for the promise should be stated in writing. The consideration is the very ground of the action, and without it the action will not lie. In the present case, that which is reduced into writing, affords of itself no ground of action. The general object of the statute was, to take away the temptation to commit fraud by perjury in important matters, by making it requisite in such cases for the parties to commit the circumstances to writing. The particular object of the fourth clause was, to prevent any action being brought in certain cases, unless there was a memorandum in writing.

*603] The object of both *was, that the ground and foundation of the action should be in writing, and should not depend on parol testimony. Unless, therefore, what is sufficient to maintain the action be in writing, no action can be supported. If we take the word "agreement" used in the fourth section in its strict sense, it would seem to imply, that the whole of that which is agreed between the parties should be in writing, and the other cases mentioned in the clause support such a construction. For upon an agreement upon consideration of marriage, or a contract for the sale of lands, it is quite clear, that the consideration must be stated in writing. But whether we construe the word in this strict sense or not, still, inasmuch as without a consideration there can be no ground of action, it seems to me, that, upon this clause, the consideration must be stated in writing. In the present case, that which is reduced into writing is merely an engagement to pay the bill. Now, unless there be a consideration for that, no action lies upon such a promise. If a consideration is to be introduced, it may be either past or future, and must be proved by parol evidence. If that were allowed, all the danger which the statute of frauds was intended to prevent, would be again introduced. I am therefore of opinion, that there must be judgment for the defendant.

BEST, J. I am of opinion that the plea is good, and that the replication is a departure from the declaration. The contract stated in the declaration is, that, in consideration that the plaintiff would forbear to prosecute an action against Pitman on a bill of exchange, defendant promised to pay the bill, to which the defendant having pleaded that such promise was not in writing, *the replication sets out the agreement itself, which is an absolute promise to pay the bill at all events, omitting altogether any mention of the consideration, which was the forbearance to sue. Now if the cause had gone down to trial on the general issue, and the written promise set out in the replication had been produced, it would have been a variance from the contract stated in the declaration. If so, it is a departure in pleading. It has, however, been contended, that the plaintiff may introduce the consideration by parol evidence; but the rule is, that a party cannot by parol evidence show that the contract is different from that reduced into writing, and here the introduction of the consideration by parol evidence would do that. For no two things can be more unlike than an absolute and conditional promise. I am of opinion, therefore, that no such parol evidence could have been received, and if so, the replication is bad. Then the question is, whether the plea is good, and I think that it is so, independently of the authority of *Wain v. Warlters*. For it appears to me impossible to satisfy the words of the statute of frauds, unless the consideration be

in writing. And whether we consider the words "agreement" and "promise," as having the same meaning, seems to me immaterial to the present decision. For the promise here is not fully and fairly stated in writing, unless it can be considered as fully and fairly stated where a promise, in reality conditional, is stated to be absolute. Again, if we take it upon the word "agreement," it must mean the whole agreement, and here the whole agreement is not in writing. Independently therefore of the authority of *Wain v. Warlters*, I am satisfied that this case falls within the fourth section of the statute of "frauds." [*605 The object of the statute cannot be attained unless the whole transaction be reduced to writing. For there would be the same danger of perjury in proving, by parol evidence, the consideration as the promise. I am therefore of opinion, that the plea is good, and that our judgment should be for the defendant.

Judgment for the defendant.*

* [The doctrine of this case has been adopted in New York : 3 Johns. Rep. 210, *Sears v. Brink & al.*; 8 ib. 29, *Leonard v. Vredenburgh*—and rejected in Massachusetts ; 17 Mass. Rep. 122, *Packard v. Richardson & al.* It has been decided by the Supreme Court of the United States, in a case under the statute of Virginia, that the consideration need not be in writing. 5 Cranch, 142, *Violett v. Patton*. The words of the statute of that state, however, are—"unless THE PROMISE or agreement, &c., shall be in writing." as Mr. Justice Le Blanc suggested that he wished the English statute were penned. See 5 East, 20.]

LEWIS v. WALTER.

Declaration for a libel published in a newspaper. Plea, that the libel was originally published in the H. Journal by I. S.; and that at the time of publication by the defendant, it was stated in such publication that it was copied from that newspaper; and that, pursuant to stat. 38 G. 3, c. 78, I. S. had made an affidavit that he was the publisher of the H. Journal, and still remained so at the time of publication of the libel : *Held*, that this plea was bad, inasmuch as the publication by the defendant did not specify by name I. S. as the original publisher of the libel, but only named the journal. *Sensible*, that even if I. S. had been named by the defendant when the latter published the libel, such publication, being of written slander, could not have been justified. *Sensible*, also, that the repetition of oral slander, accompanied by a declaration of the name of the original author, cannot be justified, unless such repetition be made without malice, and upon a fair and justifiable occasion.

The libel stated in the declaration, purported to be a speech of counsel at a trial of the plaintiff on a criminal charge ; and it stated, after setting out the speech, that a witness was called, who proved all that had been stated by counsel, and that the defendant was immediately after that acquitted, upon a defect in proving some matter of form. The plea stated, that in fact such a speech was made, and that the witness called proved all that had been so stated ; but it did not set out the evidence, or justify the truth of the charges made in the counsel's speech : *Held*, that such plea was bad, inasmuch as a party could not be justified in publishing the result of evidence given in a court of justice, but must state the evidence itself.

DECLARATION by plaintiff, for a libel upon him in his character of an attorney. It stated, that at the Hants quarter sessions a bill of indictment was found against the plaintiff and two other persons, for a conspiracy to defraud the under-sheriff of Hants, upon which indictment the plaintiff was found not guilty ; yet that the defendant, well knowing the premises, and wishing to cause it to be believed that the plaintiff had been guilty of the offence charged in the indictment, published in the Times newspaper the libel in question, which purported to be an "account of what took place at the trial. It set out the speech of the counsel for the prosecution, which, in part, contained the supposed libel on the plaintiff, and then continued, "The first witness called was R. P., who proved all that had been stated by the counsel for the prosecution. Mr. J. G., the attesting witness to the bill of sale from the sheriff to Messrs. W., was next called, but not being able to prove a deputation from the under-sheriff for that year, the jury, under the directions of the learned judge, were obliged to give a verdict of acquittal, to the great regret of a crowded court, on whom the statement and the evidence, as far as it went, made a strong impression of their guilt." Plea. 1st, not guilty ; 2d, that after the expiration

of forty days from the 28th June, 1798, and before the publishing of the said supposed libels by the defendant, on the 11th April, 1819, the supposed libellous matter set forth in the declaration was published in a certain public newspaper, entitled, "Hampshire Telegraph and Sussex Chronicle," by George Henry Motley and William Harrison. Plea then stated, that defendant, at the several times when he published the said supposed libels, did also publish that the supposed libellous matter was copied and quoted from the last-mentioned public newspaper; and that, at the time of the said supposed libellous matter being so published in the last-mentioned public newspaper, an affidavit, before then made and delivered to the commissioners for managing his majesty's stamp duties, was remaining at the office of the commissioners, pursuant to the statute, by which affidavit the said G. H. M. and W. H. made oath that they, the said G. H. M. and W. H., were, at the time of making the affidavit, the publishers of the last-mentioned public newspaper. The plea then stated, *607] *that the said G. H. M. and W. H., at the time of the publication of the supposed libellous matter by the said G. H. M. and W. H., had not, nor had either of them, signed or sworn any affidavit that they had ceased to be the publishers of the last-mentioned public newspaper. Wherefore the defendant published the said supposed libellous matter as he lawfully might. The 3d and 4th pleas did not differ materially from the first. The 5th plea, as to all except the matter following, viz., "to the great regret of a crowded court, on whom the statement of the evidence, as far as it went, had made a strong impression of their guilt," stated that, at the trial of the indictment, the counsel for the prosecution made the speech set out in the supposed libel, and that having so stated the facts, the said R. P. was called and appeared as the first witness in support of the said charges, and by his testimony proved all that had been so stated by the counsel for the prosecution, and that J. G., the attesting witness to the bill of sale of the said Messrs. W., was next called as a witness in support of the prosecution, and that not being able to prove the deputation of the under-sheriff to the officer, the jury, being so directed by the judge, were obliged to give a verdict of acquittal. The plaintiff joined issue on the plea of not guilty, and demurred generally to the other pleas.

Chitty, in support of the demurrer. The first three special pleas are bad, inasmuch as they do not state that the persons from whose paper the libel was copied were the original authors. If an action were brought against them, therefore, they might plead that, at the time of the publication by them, *they *608] also stated that they copied it from another paper. It is true that in some instances a person repeating slander which he has heard from another will be justified, if at the time of the repetition he declares the name of the person from whom he heard it. That rule, however, has never been extended to the case of written slander, by which greater publicity is given, and which is a more deliberate act. Besides, the defendant, at the time of the publication, did not give the names of the publishers, but merely a clue by which those publishers might be discovered. *Davis v. Lewis*, 7 T. R. 17, and *Woolnoth v. Meadows*, 5 East, 463, are authorities to show, that even in the case of oral slander the name of the original author of the slander must be mentioned at the time of repeating it. The fifth plea is bad, inasmuch as it only states the speech to have been made by a counsel, and then alleges generally, that a witness called in support of the charges proved all that had been stated by the counsel. Now if it be allowable to publish the proceedings of a court of justice, the evidence itself ought to be given, and not the result; for the plaintiff cannot take issue upon the fact, whether the witness proved all that the counsel said. *Maitland v. Gouldney*, 2 East, 426, is an authority to show that, in a justification that the defendant named the original author of the slander at the time, it is necessary to give the very words used, and not the effect of them. Besides, this was the publication of an ex parte proceeding, the defendant not having had an op-

portunity of proving his innocence; and *Rex v. Lee*, 5 Esp. 123, and *Rex v. Fisher*, 2 Campb. 563, are authorities to show that such a publication is not lawful.

**Platt, contra.* The first three special pleas are good. By the 38 Geo. 3, c. 78, no person shall publish a newspaper, until an affidavit shall be delivered to the commissioners of stamps, specifying the name and place of abode of the printer, publisher, and proprietor; and by s. 12, the copy of such affidavit shall, in all proceedings civil and criminal, touching any publication contained in such newspaper, be conclusive evidence of the truth of all such matters set forth in the affidavit against every person who shall have signed and sworn such affidavit, and also against every person who shall not have signed the same, but who shall be therein mentioned to be a proprietor, printer, or publisher of such newspaper. The fact disclosed in these pleas, that, at the time of publishing the libel, the defendant named the newspaper from which it was copied, and that, before that time, an affidavit was duly filed with the commissioners of stamps, by which the persons named in the plea made oath, that they were the publishers of the same, shows, that the defendant gave the plaintiff the means of ascertaining, with certainty, the original authors of the slander, and therefore, that he furnished the plaintiff with a certain cause of action against a prior propagator of the slander. For the maxim "certum est quod certum reddi potest" applies. In order to maintain an action for the publication of a libel, the libellous matter must be false and malicious; thus if a man truly charge another with an offence, though he may be indictable for it, still he may justify the truth in an action, however maliciously he may have made the charge.(a) So, in an action for a malicious prosecution *or arrest, there must be a want of probable cause, however strong the evidence of malice may be. Although slanderous matter reduced to writing will be actionable, where the same matter not in writing would not be so, yet, with respect to the ingredients of falsehood and malignity, the rules which obtain in an action for the publication of the one are equally applicable to one brought for the publication of the other. The deliberation with which an alleged calumny may be published, cannot alter the question with respect to its truth or falsehood. In this case, the defendant has not transgressed the bounds of truth, for he has only alleged by the supposed libel, that the libellous matter had been published by the proprietors of the Hampshire Telegraph, which was in fact the case; not vouching himself for its authenticity, but citing his authority; so that his publication of it could not give any confirmation or authenticity to the slander, which still stood upon the authority of the original propagator of it. Now it is a general rule, that if A. publish to B. slanderous words, and he reports them as he heard them from A., A. shall be answerable for all the damage which the individual so calumniated may sustain, by reason of B.'s having so reported it. *Earl of Northampton's case*, 12 Rep. 134. Upon principle, the same rule will apply to libels. If A. publish libellous matter, and B. report it afterwards as having been published by A., the latter shall be answerable to the person libelled, for all the damage he may sustain by reason of B.'s having so reported it; for if B. were also answerable, the plaintiff would recover his damages twice over; and the law will not allow two compensations for the same injury. The fifth plea is good, although it only states the result of the *evidence given by the witness. The reason why it is necessary in ordinary cases to set out the very words of the slander, is, to give to the party slandered a certain cause of action against the original author of the slander. But in this case that reason does not apply, because no action could be maintained, either against the counsel who, in the course of his professional duty, stated the facts of the case, or against the witness, who, in the course of a judicial proceeding, gave his evidence. That plea, therefore, is good.

(a) *Mailland v. Gouldney*, 2 East, 426.

ABBOTT, C. J. In giving my opinion upon the present case, I shall not refer to the formal objections, (a) because if the pleas were good in point of substance, the court would, no doubt, permit those pleas to be amended; nor do I think it necessary to decide, whether a plea in bar, stating that the defendant copied the libel from another newspaper, and that he at the time named the publishers of that paper, would be good; for, in the present case, although the defendant has now in his plea given those names, he did not do so when he published the libel. I am not prepared, however, to assent to the proposition, that such a defence is applicable to cases of written slander, for that would give great facility to such publications, which ought, if possible, to be prevented. Nor am I prepared to say that this is matter of defence upon a plea in bar; for it cannot be an answer to the charge of malice, which may exist in the case of repetition as well as invention; and if we held it to be a bar, that question [612] would be altogether withdrawn from the consideration of the jury. But if, instead of pleading it, it be given in evidence under the general issue, then the question, whether it were repeated maliciously, and from a design to slander or not, would be left to the jury, who might then find their verdict upon the whole case. As to the last point, the objection taken to the fifth plea, seems to me unanswerable. It is asserted in the libel, that a certain witness proved the allegations contained in a speech made by counsel in stating a case to the jury. Now that justification cannot be supported. The defendant ought to have detailed and transcribed in the publication, the evidence of the witness. If he had done so, his readers might then have judged for themselves. If a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence. I think, therefore, that these pleas are bad.

BAYLEY, J. I am of the same opinion. I think that these pleas are bad in substance. As to the first three special pleas, it does not appear that the defendant, at the time of publishing the libel, stated the name of the original author of the slander. It has been argued, however, that he did state sufficient to enable the plaintiff to find that out. But I am of opinion, that that is not sufficient. An individual slandered is not to be put to the expense and trouble of ascertaining, by inquiry, who the original libeller is. If a defendant is to be allowed to rely upon a plea of this nature (supposing that there can be such a plea in bar, which may be doubtful) it can only be in a case where he has [613] originally given up the author by name, and where the *name is sufficient to identify the party. If that be not sufficient for that purpose, I think there ought to be an additional description. I am also of opinion, that the last plea is bad. It is no justification that a defendant has truly stated, in his publication, the speech made by counsel, in stating a case to the jury; he must go further, and show the truth of the facts there stated. It is the duty of a counsel to state facts, although they may be injurious to the character of individuals, and he is privileged so to do, if he speaks conscientiously according to his instructions; but if it were to follow, that others might repeat what he says, it might be most injurious to the character of individuals; for as to them, the reason for the privilege, which is the advancement of public justice, does not apply. This principle is recognised in *Lake v. King*, 1 Sound. 181; *Rex v. Lord Abingdon*, 1 Esp. 226, and *Rex v. Creevey*, 1 M. & S. 273. Upon these grounds, I am of opinion, that this plea cannot be supported, and that our judgment must be for the plaintiff.

HOLROYD, J. I am also of opinion that these pleas are bad, and that even if they had been pleaded in a more formal manner, they could not have been supported. In actions for slander, the truth may be pleaded as a legal defence. But that plea admits the malice, and, notwithstanding that, justifies the publica-

(a) In the course of the argument, some formal objections were taken to the pleas, which, as the court did not ultimately decide upon them, have not been mentioned.

tion. It is, however, a very different thing to justify the repetition of slander, by alleging, as a bar, that some other person originally was the author of it. For it does not follow, that, because a defendant may justify slander if true, he may also justify the repetition of *slanderous words which are not true, [*614] if he has heard them from another person. Unless we go the length of holding, that such a repetition would be justifiable, even when spoken from a bad motive, we cannot support the present pleas. All the cases on this subject arise out of the case of the *Earl of Northampton*, 12 Rep. 133. They do not, however, confirm that decision, but all go on the ground of being distinguishable from it. The book in which that case is found, is not so accurate as the rest of the reports of Lord Coke, not having been published by him in his lifetime, but from his notes afterwards. The point there is stated in very general terms, and as it seems to me, may be questionable. It is put thus : "In a private action for slander of a common person, if I. S. publish that he hath heard J. W. say that J. G. was a traitor or thief, in an action on the case, if the truth be such, he may justify." It is observable, that Lord Coke does not say that it is lawful to repeat slander in all cases and at all times, but only that the party may justify under certain circumstances. If, for instance, he repeats, not with intention to defame, that may be so; but it is not laid down, that a defendant may maliciously do so; and unless it goes that length, it will not support the present pleas. But I think it is questionable, whether, as stated, it must not have some qualification added; for in the third resolution, cases are put in which it is held to be unlawful to repeat slander. Taking, therefore, the whole together, it seems to me, that the proper way is, to take the passage with this qualification, that if J. S. publish, *on a fair and justifiable occasion*, that he hath heard J. W. say that J. G. was a traitor or thief, he may, if the truth be such, justify. It must not, therefore, be taken *as a general rule, even [*615] in oral slander, that the malicious repetition of it may be justified, if the name of the author be given up at the time. If it could, it would be productive of mischief; for the person slandered could bring no action against the malicious repeater, and if he did discover who the person was, and brought an action against him, he might only be able to support it by the testimony of the very person who had so maliciously repeated it. Perhaps, therefore, the rule has been laid down too largely in the *Earl of Northampton's case*, and ought to be qualified, by confining it to cases where there is a fair and just reason for the repetition of the slander.* In the present case, however, it is clear, that there must be judgment for the plaintiff. On the other point, I concur with the rest of the court.

BEST, J. I am of the same opinion. The attempt here is to justify this libel under the authority of the *Earl of Northampton's case*. If this precise point had been there determined, I should doubt the propriety of that decision; and I think that the reasons given by my brother HOLROYD show that the fourth resolution in that case requires some qualification. For it cannot be justifiable to repeat slander under all circumstances; but only in those cases where it is done, not for the purpose of merely circulating the slander, but for some fair and reasonable cause. And, besides, I am not prepared to say that that case extends to written slander, in which the repetition, by producing a greater dispersion, increases in a tenfold degree the injury to the individual. I think, therefore, that the first three special pleas are bad. As to the last plea, I also agree with the rest of the court. Here the proceeding which was *published was not complete, the case having been stopped in limine. And [*616] the words of the witness are not stated, but the substance of his evidence. This, therefore, cannot be justified. Besides, the defendant must have known, when he copied it from the other paper, that it was an illegal publication; and

* [The same opinion is intimated by Kent, C. J., 10 Johns. Rep. 449.]

he cannot be justified in republishing a statement which he knew to be unlawful.

Judgment for the plaintiff.*

* [See Pennington's Rep. 169; 1 Binney 85, *Kennedy v. Gregory*; 10 Johns. Rep. 447, *Dole v. Lyon*; 13 East 554, *Bell v. Byrne*.]

The KING v. GLOSSOP.

In a conviction of defendant for causing to be acted at a certain place called the Coburg Theatre, in the Parish of St. Mary, Lambeth, for gain and reward, a certain entertainment of the stage called Richard the Third, the evidence set forth was, that the defendant was seen once or twice at the rehearsals of Richard; that another person was stage-manager; that defendant engaged I. S. to perform, and gave him a check for the amount of his benefit: *Held*, that this was sufficient to warrant the justices in drawing the conclusion that the defendant caused the play of Richard the Third to be performed.

The conviction also stated, after the appearance and plea of defendant, that divers credible witnesses, to wit, I. S. &c., came before the justices upon their several oaths, to them severally and respectively, and in the presence of the said I. S. &c., duly administered: *Held*, that taking it altogether, it did substantially appear that the oath was administered to the witnesses in the presence of the magistrates.

The evidence also stated, that the Coburg Theatre was in the parish of Lambeth, and the adjudication of the penalty was to the poor of the parish of St. Mary, Lambeth: *Held*, that this was no variance, it not appearing that there were two distinct parishes so named.

THE conviction stated that on, &c., at &c., C. W. W. came before two justices for the county of Surry, and informed them, that defendant, late of the parish of St. Mary, Lambeth, in the county of Surry, in a certain place in the parish aforesaid, called the Royal Coburg theatre, without lawful authority of letters patent, and without license from the lord chamberlain, did cause to be acted, for gain and reward, a certain entertainment of the stage, to wit, a certain tragedy called Richard the 3d, or the Battle of Bosworth Field, &c., contrary to the statute, &c. The conviction then stated *the appearance of defendant, and plea of not guilty; and then proceeded thus, "nevertheless, upon this same day and year last aforesaid, at the said police-office, Union Hall, in the said parish of St. Saviour aforesaid, divers credible witnesses, to wit, one John Toovey, one Junius Brutus Booth, and one William Allway, came before us the said justices, upon their several oaths, on the Holy Gospel of God, to them severally and respectively, now here and in the presence of the said John Toovey, Junius Brutus Booth, and William Allway, respectively duly administered: depose, swear, and in the presence of the said Joseph Glossop, upon their oaths aforesaid, severally affirm and say," &c. In the evidence it was stated, that the Coburg theatre was in the parish of Lambeth; and that an alteration of the play of Richard the 3d was acted there for money. As to the defendant's causing that play to be represented, the evidence stated was, that J. B. B. became acquainted with defendant as manager and proprietor of the Coburg theatre; that defendant was seen once or twice at the rehearsals of Richard; that another person was stage-manager; that J. B. B. engaged with defendant to perform several characters; that J. B. B. applied to defendant for that purpose; and that defendant made him an offer for twelve nights, to perform; that the contract was in writing; that J. B. B. afterwards performed there. That at his benefit defendant gave him a check for the amount. The conviction concluded, that defendant was guilty, and adjudged the penalty of 50*l.*, one-half to the informer, and one-half to the poor of the parish of St. Mary Lambeth, being the parish where the offence was committed. The conviction having been removed into this court by certiorari.

*618] *Marryat, Casberd, and Adolphus*, took three objections to it. First, that it did not sufficiently appear that the defendant had caused the play of Richard the 3d to be performed. All that appears is, that he was seen at one or two rehearsals of Richard, and that he offered to engage performers, and paid them. But these facts do not show even *prima facie* that he caused that

particular play to be performed, which is necessary. Secondly, the witnesses do not appear to have been sworn in the presence of the magistrates, or of the defendant. They are stated to have been sworn in the presence of themselves only. If so, the evidence was improperly taken. Thirdly, the adjudication of the penalty is to the poor of St. Mary Lambeth, whereas the evidence states the Coburg theatre to be in Lambeth only, and now conстат that Lambeth and St. Mary Lambeth are the same parish.

Scarlet, Gurney, F. Pollock, and Turton, contra were stopped by the court.

ABBOTT, C. J. As to the first objection, it is sufficient to say, that it cannot prevail, unless the evidence stated on the face of the conviction, be such as that no reasonable person could draw the conclusion, that the defendant caused this particular play to be performed. I am very far from thinking that to be the case. The magistrates might very reasonably draw the conclusion, and having done so, we cannot overturn their decision as to the fact. As to the second objection, the whole forms one sentence; and it is there stated, that the defendant having appeared before the magistrates and pleaded not guilty, "nevertheless, upon this same day and year, divers *credible witnesses, to wit, &c., ["619 come before us upon their several oaths, on the Holy Gospel of God, now here in the presence of the said witnesses duly administered, &c.]" Taking the whole together, I think it substantially appears that the oath was administered in the presence of the magistrates to the witnesses. As to the last objection, I think the evidence sufficient to support the adjudication. It does not appear that Lambeth, and St. Mary, Lambeth, are two parishes, and unless that be so it is no variance. If in the trial of an ejectment, the premises were described to be in St. Mary, Lambeth, and the evidence stated them to be in Lambeth, I think it would be no variance. And it was so held in *Doe dem. Tollet v. Salter*, 13 East, 9, where the ejectment was for lands in Farnham, which, at the trial, were proved in Farnham Royal: and there it was held no variance, the defendant not having proved that there were two Farnhams. I do not think therefore, that the magistrates were wrong in the adjudication made by them, on this evidence. Upon the whole, therefore, none of these objections are sufficient, and the conviction being regular, must be affirmed.

Conviction affirmed.

The KING v. The Inhabitants of HOLY CROSS, WESTGATE.

Where a pauper was legally sworn in as a borsholder at a court-leet, and after executing the office for a few days, he was afterwards irregularly, by two magistrates, discharged from executing his office, and another person appointed; but he acquiesced in this, and did not in fact afterwards execute the office: Held, that this was not executing an annual office within the parish so as to confer a settlement.

Two justices by their order removed the pauper, Edward Best, from the parish of Holy Cross, Westgate, in the city of Canterbury, to the parish of Holy Cross, Westgate, in the county of Kent. The sessions on appeal confirmed the order subject to the opinion of this court upon the following ["620 case. The city of Canterbury is divided into six wards, and two of the twelve aldermen of the city are appointed for each ward, a court-leet is held annually by the two aldermen, at which a constable and borsholder for the ward are chosen. In the month of October, 1817, and for some time previously, the pauper resided and carried on business in the parish of St. Mary Northgate Canterbury, which is in the ward of Northgate, that ward containing the parishes of St. Mary Northgate, and St. Alphege. On the 21st October, 1817, the annual court-leet was held for the ward of Northgate, at which the pauper was duly chosen borsholder of the ward for the year ensuing, and upon being sent for to take upon himself the office, he attended at the court, and was regularly sworn in, the staff of office was also delivered to him by the former borsholder. A day or two afterwards he happened to be at the City Arms public house,

within his ward, when a dispute arose between some persons, which was likely to create a disturbance, and he was desired to preserve the peace; in consequence of which, he fetched his staff, and put an end to the dispute, but he did not do any other act as borsholder than that. After he had been sworn in a few days, he was desired to attend the monthly meeting of the magistrates, and he attended with his staff; he was called into the council chamber, and informed by the then mayor, that as it was a question to what parish he belonged, he must leave his staff there for the present, and that he should know further about it in a few weeks, he left his staff accordingly, and not having heard any [821] thing more, he did not act, "nor was he called upon afterwards to act as borsholder. The steward of the leet notified the pauper to the magistrates, as the sworn borsholder for the ward of Northgate, and he appeared so in the list of the peace officers, entered in their record book. The succeeding court-leet for the ward of Northgate was holden on the 20th October, 1818, and the pauper resided during the whole of the year in the parish of St. Mary, Northgate. The duties that were required to be performed by the borsholder of the ward of Northgate, during the remainder of the year, were performed by another person, who resided part of that time within the ward, and part in the borough of Staplegate, adjoining to the ward, but not within the jurisdiction of the city of Canterbury, but that another person was not chosen or sworn in as borsholder of the ward, nor did he attend the sessions in that character, nor was his name enrolled in the list of peace-officers.

Berens, in support of the order of sessions, after stating the case, and that the question was, whether the pauper gained a settlement under 3 & 4 W. and M. c. 6, by executing a public office in the parish during a year, was stopped by the court.

Bolland, contrà. In this case the pauper was the legal borsholder during the whole year; for the mayor had no right to remove him from the office over which he had no jurisdiction; nor can he be considered as having executed the office by deputy. For all the cases of deputies are where they are appointed by the courts leet, which was not done here. The pauper therefore [822] was the legal officer, and resided in the parish for a "year, and there is nothing which shows any refusal on his part to perform the duties of his office. In fact he would have been liable to punishment, if he had so refused.

Abbott, C. J. At the time of the passing 3 & 4 W. and M. c. 6, it was possible for any individual to gain a settlement by a residence for forty days in the parish. The object of that act was, to add to this the necessity of delivering to the parish officers a notice in writing, which they were required to read in the church and to register, in order that there might be public notice to all the inhabitants, that they might, in case the individual was likely to become chargeable, procure his removal from the parish. But that act contemplated two cases, in which no notice in writing was to be given, viz. the serving an annual office and the payment of parish rates. Its object was obviously notoriety. Now that is only attained by the actual execution of the office, and not by the appointment to it. Although, therefore, it does appear, that the pauper in this case was irregularly discharged from his office, and another person irregularly appointed to succeed him, yet as he did forbear to do the duties of it, I think he cannot within the statute be considered as having executed a public annual office in the parish, and that he did not thereby gain a settlement. The judgment of the sessions was therefore right.

Order of Sessions confirmed.*

* [See 1 Wils. 81, *Fittleworth and Pulborough*; 12 Mass. Rep. 262, *Paris v. Hiram*.]

***The KING v. The Inhabitants of the West Riding of YORKSHIRE.** [*623]

In a plea by the inhabitants of a county, that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge situate within the township, it is not necessary to state any consideration for such prescription.

INDICTMENT, in the usual form, against the defendants, for the non-repair of 300 feet of the highway next adjoining the south end of Leeds bridge, in the West Riding of the county of York. The plea admitted, that, as to 75 feet next adjoining the south end of the said bridge, the inhabitants of the West Riding were liable to repair the same; but stated, as to the residue of the said highway, that the bridge was an ancient bridge, situate from time immemorial within the township of Leeds, in the said Riding, and that the said residue of the said highway, from time immemorial, had also been situate in the said township; and from time immemorial had been repaired by the inhabitants of the township of Leeds. Demurrer and joinder.

Blackburne, for the crown, in support of the demurrer. The plea is bad in not stating any consideration for the prescriptive liability of the inhabitants of the township of Leeds to repair this part of the highway. *Rex v. St. Giles', Cambridge*, 5 M. & S. 260, the plea was held bad for this reason. And the ground of the decision in that case, that there could not be any possible consideration for casting the burden of repairing the road on the inhabitants of another parish, equally applies here. For the inhabitants of Leeds are equally with the rest of the Riding bound to contribute to the *repairs of other bridges. In *Rex v. Ecclesfield*, 1 B. & A. 359, a consideration appeared [*624 on the face of the record. For there it was stated as a general custom in the parish for each township to repair its own roads.

E. Alderson, contrâ, stopped by the court.

ABBOTT, C. J. The uniform course of pleading is to state the prescription, as in the present case. The case of *Rex v. St. Giles', Cambridge*, is quite distinguishable, on the grounds stated in the judgment of the court in *Rex v. Ecclesfield*. Here the highway is situate within the township of Leeds. The object of the form of the plea in *Rex v. Ecclesfield* probably was to allow greater latitude to the evidence in support of it, and also because possibly the road indicted in that case was not an immemorial highway. Here it is the ordinary case of a township, liable to repair a part of a bridge situate within it, of which there are many instances in the books. There must, therefore, be judgment for the defendants.

Judgment for the defendants.(a)

(a) See 7 East 588 *Rex v. Inhabitants of the West Riding*.

The KING v. The Inhabitants of TYRLEY.

A pauper having hired himself without specifying any time, entered into the service the day before New-year's day, and quitted two days after Christmas, receiving his full wages: that being the usual time that servants in that part of the country go into and leave their places. The court thought that this was a contract which had arrived at its termination before the expiration of a year; but the sessions having expressly found it to be a hiring and service for a year, the court considered themselves as bound by that finding.

Two justices, by their order, removed Edward Peake and family from the township of Audlem, in the county of Cheshire, to the township of Tyrley, in the *county of Stafford. The sessions, upon appeal, confirmed the order, [*625 subject to the opinion of this court, on the following case. Edward Peake, the pauper, hired himself at 8*l.* and his washing, without any time being specified, but which the sessions found to be a general hiring for a year. The pauper entered into his service the day before New-year's day, and quitted, with the consent of his master, two days after Christmas day, the usual time

that servants, in that part of the country, go into and leave their places. The pauper received the whole of his wages at the time of his quitting, and stated, that when he left, he considered himself no longer under the control of his master. The sessions confirmed the order, and found this to be a hiring and service for a year.

Nolan, in support of the order of sessions, was stopped by the court.

Pearson, contra. Although the sessions have found it to be a hiring for a year, yet it is clear their decision is wrong, for there is no ground for presuming any dispensation with the service. It is expressly stated that this pauper quitted at the usual time, and came in also at the usual time. There was, in substance, therefore, only a hiring, according to the custom of the country, which it appears is for a less period than a year.

Abbott, C. J. As the sessions have expressly found the fact of a hiring and service for a year, I think we are bound by it. I cannot say that no reasonable person could come to such a conclusion upon the facts stated, although

*626] I certainly should not have come to *it myself. I should have thought, that, in this case, there was neither a dispensation with the service, nor a dissolution of the contract, but that the contract had arrived at its termination, and that before a year had expired. But still, as the question was properly for the determination of the sessions, who have expressly found the fact otherwise, I think their order must be confirmed.

Order of sessions confirmed.

The KING v. The Justices of SALOP.

Semple, that the entering into the recognisance required by 49 G. 3, c. 68, s. 5, before the justices, who make an order of bastardy, does not dispense with the necessity of giving such justices notice of appeal against the order, the statute requiring the party to give notice of bringing such appeal, "and of the cause and matter thereof."

But held, that a parol notice of such appeal, and of the cause and matter thereof, will be sufficient.

Pearson on a former day had obtained a rule, calling upon the defendants to show cause why a writ of mandamus should not be directed to them, commanding them to cause continuances to be entered, and hear the appeal of one Joseph Oliver against an order of two magistrates, under the 49 G. 9, c. 68, s. 5, whereby the said Joseph Oliver was adjudged to be the reputed father of a bastard child. It appeared, by the affidavits upon which the rule was obtained, that the order in question was made on the 30th January, that immediately upon the order being made, the appellant entered into the recognisance required by the statute, before the justices who made the order ; and that a regular notice of appeal to the quarter sessions, to be holden on the 30th April, was served, on the 9th of April, upon the churchwardens and overseers of the parish on whose behalf the order was made. When the appeal was called on for trial at the sessions, it was objected by the respondents, that no notice had been given *627] to the justices who made the order, of the intention *to bring the appeal, and of the cause and matter thereof, as required by the statute ; and upon the sessions holding such notice to be necessary, the appellant offered to prove, that, previous to entering into the recognisance, he gave a parol notice to the justices who made the order, of his intention to appeal against it, and of the cause and matter of such appeal ; but the sessions would not allow such notice to be proved, and dismissed the appeal. The rule was obtained upon two grounds ; first, that the entering into the recognisance before the justices who made the order, dispensed with the necessity of giving them a notice of appeal ; and, secondly, that in case a notice to the justices was necessary, the sessions ought to have received the evidence of a parol notice, which was tendered by the appellant.

Russell now showed cause. As to the first ground upon which the rule had

been obtained, it may be admitted, that if the statute, under which this order was made, had merely required that the justices making the order should have notice of the appeal, it might be difficult to contend, after the cases of *Rex v. The Justices of Leeds*, 4 T. R. 583, and *The Justices of Essex*, 4 B. & A. 276, that a sufficient notice had not been given by the appellant entering into the recognisance before them, at the time they made the order. But as the statute requires that the justices should not only have notice of the intention of the party to bring an appeal, but should also have notice "of the cause and matter thereof," it seems clear, that the recognisance could not dispense with the notice required by the statute, inasmuch as no information, as *to the cause [*628] and matter of the appeal, could be communicated to the justices by the terms of the recognisance. Both in s. 5, and s. 7, of the statute, the notice and the recognisance are mentioned, as distinct and independent proceedings. [BAYLEY, J.] Supposing the argument to be correct, that the entering into the recognisance was not a sufficient notice within the statute of "the cause and matter of the appeal," how can the other ground, upon which the rule has been obtained, be answered, viz., that evidence of the parol notice ought to have been received by the sessions? It appears, from the affidavits filed in answer to the rule, that it is the practice, and one of the standing orders of the sessions for the county of Salop, for all notices of the trial of appeals in that court to be in writing; and this is a reasonable practice of the court of quarter sessions which this court will sanction. In Paley on Convictions, 202, in speaking generally of appeals allowed by statutes, it is laid down that "the notice, where the statute requires any, should be in writing." Besides, as in this case the statute directs a notice to be given of the "cause and matter" of the appeal, it must be presumed, that a notice in writing was contemplated, though not expressly required by the words of the statute, as the justices cannot be expected to remember the cause and matter of an appeal contained in a parol notice, which may possibly be minute and circumstantial, and may be given at a time when the justices are too much occupied with other business, to make a memorandum of the cause and matter which it contains.

Pearson, contra, was stopped by the court.

*BAYLEY, J. I am of opinion, that in this case the sessions ought [*629] to have received the evidence of the parol notice of appeal which was tendered by the appellant. It may be convenient, that a notice of appeal, particularly where it is a notice of the cause and matter of the appeal, should be in writing; and in many cases the statute giving the appeal requires that there should be a written notice; but we cannot say that a notice in writing is necessary, where it is not required to be in writing by the clause in the statute, which directs a notice to be given. An appeal is usually allowed by statute on certain conditions; and when one of those conditions is, that the party appealing shall give a notice of his appeal, it would be to add a further condition, if we were to hold that such notice must be in writing.

HOLROYD, J., concurred.

Rule absolute. (a)

(a) Abbott, C. J., and Best, J., had left the court.

*FAITH v. THE EAST INDIA COMPANY. [630]

By a charter-party, freight was agreed to be paid for the use or hire of the ship at a certain rate per ton, for a voyage out and home, in manner following, viz.: a certain sum in advance on the ship's clearing outwards, and the residue half in cash and half in approved bills, upon the delivery of the homeward cargo; the owner also appointed C. S. master, at the request of the charterer, who executed a bond, conditioned for the faithful performance of the master's duty; and the owner expressly instructed C. S. to be careful to sign all bills of lading with the clause, "freight payable as by charter-party." The ship was consigned to C. and Co., in Calcutta,

by whom she was put up, for her homeward voyage, as a general ship, and different merchants shipped goods by her, C. and Co., taking for homeward freight bills payable 60 days after delivery of the cargo ; and a new master having been appointed by C. and Co. in conjunction with C. S. signed bills of lading with the clause, "paying freight agreeable to freight bill." The freight bills were made payable in London to B. and Co., to whom the charterer was indebted for advances on the outward cargo, and who, as well as C. and Co., were cognisant of the terms of the charter-party : Held, that the owner of the ship had a lien on these goods to the extent of the homeward freight.

C. and Co. also put on board the ship goods purchased by them on account of the charterer ; but he being indebted to them, and B. and Co., their agents, those goods were by the bill of lading consigned to B. and Co. : Held, that as between the owner of the ship and B. and Co. the goods were to be considered as the goods of the charterer, and liable to the owner's lien on them for the freight due by charter-party.

In the charter-party, the freighter promised to pay and defray two-thirds of the port-charges : the owner having paid the whole, was held to have no lien on the goods shipped for those charges.

DEBT for money had and received. Plea, nil debent. The cause was tried before ABBOTT, C. J., at the London sittings after Trinity term, 1819, when a verdict was found for the plaintiff, for the sum of 7042*l.*, subject to the opinion of this court, upon the following case. The plaintiff was owner of the ship Eliza, of which Charles Sivrac was master, and on the 14th of June, 1816, entered into a charter-party with John Burton Gooch, which contained provisions, that the ship should take on board a cargo, and proceed to Bengal, and being arrived there, give notice thereof to the agents of the freighter ; and make a right and true delivery of the cargo unto them, agreeable to bills of lading : and that after such delivery, the master should take on board from the agents of the freighter, at Bengal, all such other lawful goods as they might think proper to ship, and proceed back to London, and being arrived there give

*631] notice thereof to the freighter, his executors, *&c., and make a right and true delivery of the homeward cargo unto him or them, agreeable to bills of lading, that might be signed for the same, and then end the voyage. Freight to be paid by Gooch for the use or hire of the ship, for the whole of her voyage, at the rate of 16*l.* sterling per ton, register measurement of the ship, together with 5 per cent. primage thereon, such freight and primage to be paid in manner following, that is to say, the sum of 500*l.*; or so much thereof as the freight of the outward cargo might amount to, calculated in the usual manner, on the day of the ship's clearing outwards ; and the remainder, on a right and true delivery of the homeward cargo, in manner following, viz., one moiety in cash, and the other moiety by approved bills, payable at two months' date from that period. And the freighter further promised to pay and defray two-third parts of all port-charges, (pilotage and lights dues excepted,) which the ship might incur during the voyage. There was added to it the following memorandum :

"It is hereby agreed, that the expenses of the ship in India are to be advanced by the freighter's agents at the exchange of the day ; and letters of advice are to be written and sent to the owner, stating the amount of such advances." The charter-party was entered into by Gooch, on behalf of himself and Sivrac, who had previously agreed with him to be jointly interested in freighting the ship, and in an adventure of goods to be sent out by them to the East Indies, and there sold, and other goods to be purchased with the proceeds thereof, and brought home to England, on their joint account. Upon the recommendation of Gooch, the plaintiff appointed Sivrac master of the ship for the voyage. On the

*632] 15th of *August, Gooch and Sivrac executed a bond to the plaintiff, conditioned for the faithful performance of Sivrac's duty, as master. On the 13th of August, 1816, the plaintiff delivered a letter of instructions to Sivrac, as master, containing, amongst other things, as follows : "It is my particular request, that you will be careful to sign all your bills of lading, with the clause of freight, payable according to charter-party inserted therein, before you sign the same, as well as the usual clause of quantity and contents unknown, and to cancel all the bills of loading for the outward-bound cargo when delivered." Gooch and Sivrac having purchased divers goods to form part of the outward

cargo, the former applied to the house of Bazett and Co. merchants in London, the real defendants, for a loan of money on the security of the cargo, proposing that it should be consigned to the house of Colvins and Co., at Calcutta, as the agents of Bazett and Co., in order that Colvins and Co. might sell the goods, and out of the proceeds retain for the use of Bazett and Co., so much money as they should advance for Gooch and Sivrac, and purchase other goods with the residue, if any, for and on account of Gooch and Sivrac, to be consigned to Bazett and Co. who were to receive the homeward goods as the agents of the parties interested therein. Bazett and Co. agreed to this proposal, and advanced the sum of 4218*l.* 12*s.* 1*d.* for that purpose, and received from Gooch and Sivrac a bill for 3000*l.*, drawn by them on Colvins and Co. the consignees of the goods sent by Gooch and Sivrac to Calcutta, as a security for part of these advances; and as a further security, bills of lading of the outward cargo were sent by Gooch and Sivrac in the ship, made deliverable to Colvins and Co. at Calcutta, to whom the *ship was consigned. When Bazett and Co. [*633 agreed to advance Gooch money, on the security of the outward cargo by the Eliza, it was agreed, that the homeward cargo should be consigned by Colvins and Co. to the house of Bazett and Co. Accordingly, a letter was written by Gooch to Colvins and Co. dated 12th August, 1816. "Enclosed you have a list of goods, which I request you to purchase in proportion to the extent of funds realized by the investment per Eliza, which I consign to you through the house of Bazett and Co.; and should you feel inclined to enable us to invest to the full amount of the enclosed list, by holding the bills of lading on the cargo, as security, I then request you to purchase, subject to such alterations as you may deem advisable, in conjunction with our friend Captain Sivrac. I forward you also a copy of the charter-party for your guidance, and by which you will be enabled to judge whether it will be most for your interest to take the current freight of the day, or to invest the goods above-mentioned." On the 14th of August, 1816, Bazett and Co. wrote, with the outward cargo, to Colvins and Co., parts of which correspondence were as follows: "We are commissioned by Gooch and Sivrac to consign their interest to your management. These gentlemen have chartered the Eliza for the voyage to Bengal, and home; and have shipped on their own account an investment, of which we have to hand you herewith the invoice, bills of parcels and bills of lading. No. 5 is a letter to you from themselves touching the return cargo, as far as it relates to their own funds. We think you may find it necessary to make considerable alterations in the memorandum which it encloses, and this you will in course do with the concurrence of Sivrac. The shipment, *of whatever it may [*634 consist, is to be directly consigned to us, and, as we have to request you will procure freight for the vacant tonnage, we have further to add, that the freight bills are to be made payable to us; in short, that the entire concerns of the expedition are to pass into our charge. This is clearly and explicitly understood between Sivrac, Gooch, and ourselves. No. 6 is a copy of the charter-party, with the provisions of which you will have the goodness to comply as accurately as may be practicable." The ship arrived at Calcutta, in March, 1817, under the command of Sivrac, who, on the 25th of that month, wrote a letter to the plaintiff, in which he says, "I shall be mindful of the tenor of your instructions." Soon after this Sivrac gave up the command of the ship at Calcutta, and Colvins and Co. concurred with Sivrac in appointing one Robert Oliver master in his stead. Colvins and Co. sold the outward goods at Calcutta, and out of the proceeds thereof appropriated the value of 3000*l.* to the discharge of the bill drawn on them in favour of Bazett and Co. for their advances; they also put up the ship as a general ship at Calcutta, and various merchants there shipped goods on board of her, consigned to different persons in London, and respectively drew instruments for the amount of the freight agreed to be paid for, the same in the following form." "Exchange for 234*l.*

sterling, Calcutta, 24 April, 1817. Sixty days after the safe arrival of the ship Eliza at the port of London, with the goods on board as specified in the annexed list, and delivered agreeable to the bill of lading, pay this our first of exchange (second and third of the same tenor and date unpaid) to Messrs. Bazett and Co., or order, the sum of 234*l.* value in freight per said ship." These ^{*635]} instruments were endorsed by Colvins ^{*}and Co., and made payable to the order of Bazett and Co., to whom they were remitted; and all of them, except three, were accepted by the consignees; but none of them were paid, in consequence of the disputes between the plaintiff and Bazett and Co. Colvins and Co. did all the business of the ship at Calcutta, and Oliver, the master, signed bills of lading for the goods in the following form: "Shipped by, &c., to be delivered, &c., they paying freight for the said goods agreeable to freight bill, with primage and average accustomed." The state of trade was unfavourable at Calcutta when the Eliza arrived there, and Colvins and Co., being unable to procure a full freight for her, except on very low terms, thought it more advantageous for Gooch and Sivrac to purchase goods on their account to fill up the ship than to accept of the freights on the low terms offered, and accordingly they bought for and on account of Gooch and Sivrac 140 bales and 100 half-bales of cotton, which they marked with the letters G. & S., and shipped on board the Eliza, consigned by the bills of lading, by Colvins and Co. as shippers, to Bazett and Co. On the 10th May, 1817, Colvins and Co. wrote to Bazett and Co. as follows: "It is with no little disappointment that we add, that this small sum comprises the whole of the ship's freight, excepting for the cotton shipped on Gooch and Sivrac's own account, which is of course not drawn for." At the time the Eliza sailed from Calcutta on her homeward voyage, a great deal remained to be done by Colvins and Co. in regard to the sale of the outward cargo, consigned to them, and the making up of the accounts thereof. In their letter of the 10th May, 1817, they had informed Bazett and

^{*636]} Co. in general terms, that they would have to account ^{*}with Gooch and Sivrac for the property therein mentioned, but that complete accounts could not be sent at that time, for the whole of the outward cargo was not then sold, nor the whole of the proceeds of the part then sold received. The ship arrived in London in December, 1817, under the command of Oliver, and, during the whole of the voyage, was navigated by a crew who were hired, paid, and maintained by the plaintiff. Gooch and Sivrac were then in insolvent circumstances, and afterwards became bankrupts. The freight then due to the plaintiff, according to the charter-party, amounted to 6668*l.* 7*s.*, and the port charges to 310*l.* 7*s.*, for the amount of which the action was brought. No part of that sum had been paid to the plaintiff. By the acts establishing the East India Docks, the owners of ships, by giving notice of their demand, retain their lien for freight upon goods landed there, and upon the proceeds thereof, when sold by the East India Company. The plaintiff having demanded payment of the sum of 6978*l.* 14*s.*, according to the charter-party, immediately gave notice to the different consignees on whom the instruments were drawn, not to accept or pay the same, but to pay him the freight of the goods consigned to them. He afterwards, as well as Bazett and Co., gave regular notice to the East India Company not to deliver up the goods till freight was paid. The whole of the homeward cargo was sold in the usual manner at the sales of the East India Company, and they received the proceeds thereof. With the consent of Bazett and Co. and the plaintiff, the proceeds of the goods belonging to the different shippers were paid to the different consignees thereof, deducting ^{*637]} the freight, amounting to 4502*l.* 6*s.* 7*d.*, which the East ^{*}India Company retained for the use of the persons entitled to receive the same. They likewise retained the sum of 2418*l.*, being the whole of the proceeds of the cotton marked G. & S., for the use of the plaintiff, if it should be found that he, as owner of the ship, had a lien to that amount on those goods; and if it

should be found that he had no such lien, then for the use of Bazett and Co. Of the sum of 4218L 2s. 1d., originally advanced by Bazett and Co., there remained still due to them a considerable sum. There was likewise due to them, on other dealings with Gooch and Sivrac jointly, and from each of them separately, a considerable sum of money. In Michaelmas term, 1818, the plaintiff commenced this action, whereupon the East India Company filed a bill of interpleader in the Exchequer, making the plaintiff and Bazett and Co. defendants in such suit. On a motion in that court, it was ordered that the action should be defended by Bazett and Co.

Campbell was to have argued on behalf of the plaintiff, but the court now called upon

Parke, for the defendant. There are three questions in this case; 1st, Whether the plaintiff is entitled to any lien on the goods shipped by the different sub-freighters? 2dly, If he is so entitled, then to what extent he has a lien on the goods shipped by Colvins and Co., consigned to Bazett and Co.? and, 3dly, Whether he has any lien at all for the port-charges? As to the first of these questions, it is to be observed, that, in *Hutton v. Bragg*, 2 Marsh, 339; [7 Taunt. 14, S. C.] it was held that the owner *of a ship under [*638 such circumstances as the present, has no lien on the goods of the sub- freighters. It must be admitted, however, that *Saville v. Compton*, 2 B. & A. 503, is at variance with the authority of *Hutton v. Bragg*, and that *Christie v. Lewis*, 2 Brod. & Bing. 410, has since overruled it. But still, according to all the cases, the owner has a lien only on the goods of the charterer, for the freight due by the charter-party, and on the goods of the other persons put on board the lien is confined to the freight due upon delivery, according to the terms specified in the bill of lading. In *Paul v. Birch*, 2 Atk. 621, Lord HARDWICKE says, "The bankrupts (who were in that case the charterers of the ship) made an agreement with the owner on their own account, and not on the part of the merchants, and therefore the merchants are not liable. Otherwise they would be in the hardest case imaginable, for they would be liable to any private agreement between the occupiers of the ship, and the original owners." And he adds, that the person letting out the ship must take care that the charterer is a substantial person, otherwise he will suffer by his neglect. The result of that case was, that the merchants were held liable to pay to the owner the freight, which, by their agreement, was to have been paid by them to the charterer on delivery of the goods. And the lien of the owner was allowed to that extent. In *Mitchell v. Scaife*, 4 Campb. 298, and in *Christie v. Lewis*, the same rule prevailed, and the rule is consistent with justice, for otherwise the law would allow the charterer to pledge the goods of the sub-freighter for his own debt. Now, if this principle be applied to the present case, *it [*639 will appear that here nothing is payable to the charterer on delivery, and consequently he could have no lien on the goods. The owner, therefore, who stands in his situation, has no lien on the goods of the sub-freighter. The real question is, whether there is any thing by which the charterer of this ship is absolutely restrained from making any contracts he may choose with the sub-freighters. And if there is nothing to prevent him from stipulating for any freight, and on any terms that he may please, the owner must take the consequences following from such stipulation. There is nothing in this charter-party specifying in what form the bills of lading shall be taken. Suppose the charterer had received at Calcutta the freight in advance for the goods. Could it be contended, that then the sub-freighters would be bound to pay it over again to the owner of the ship? If so, why may they not make any contract with the charterer, which they may choose to do, provided it be not fraudulent with respect to the owner of the ship. There is nothing fraudulent in what has been done here, for if these bargains had not been made, the ship would not have had these goods on board; and then the owner would not have had

any freight to receive. Besides it cannot be put on the ground of fraud; for the court never infer fraud unless it be found by the jury, which is not the case here. But supposing that the sub-freighters are liable, then the second question is, as to the extent of the plaintiff's lien on the goods put on board by Colvins and Co., at Calcutta. It is contended that these are the property of Gooch and Sivrac, and as such, liable to the freight per charter-party. But this is not so. The goods are deliverable to the agents of Colvins and Co.

*640] No property, *therefore, passed to Gooch and Sivrac by their being put on board the ship. The property in such cases vests immediately in the consignee of the bill of lading, and *Haille v. Smith*, 1 Bos. & Pul. 563, is a direct authority in point. There the property was held to be in the consignee, although the profit or loss was to fall upon the consignors, as it is in this case to fall on Gooch and Sivrac, *Evans v. Marlett*, 1 Ld. Raym. 271, is to the same effect. The legal owners, therefore, of these goods were Bazett and Co., to whom they were consigned, and in that case the lien of the plaintiff will be confined, at all events, to the freight due on the bill of lading. As to the third point; at all events, the owner has no lien for the sum paid for port-charges. His remedy is by action against the charterer, for a breach of covenant in not paying his proportion of them; but there is no authority for saying, that if the owner pays them, he has a lien for the amount. There is no lien for dead freight, or for demurrage, which are analogous cases.

Campbell in reply, as to the third point. No time is stipulated by the charter-party when these charges are to be paid. The amount can only be ascertained at the end of the voyage, and they are in fact usually considered as part of the freight. If so, there is the same lien for them as for the freight.

ABBOTT, C. J. It is very satisfactory to my mind to find, that the law enables us to decide this case in favour of the plaintiff. By the very terms of this charter-party, the freight was to be paid on the delivery of the goods.

*641] *Then the question is, whether Gooch can, by a collusive bargain with Colvins and Co., and other third persons, permit them so to ship goods as to deprive the owner of his lien. It is not necessary to decide what effect the payment of the freight, if made before the goods were laden on board in the East Indies, would have had. If such an event had happened, which however is not very probable, perhaps the owners' lien for freight might have been thereby defeated. But in this case the freight has not so been paid, and the only question is, whether this bargain to receive the freight by freight-bills made between Gooch and Sivrac, and Colvins and Co., (the latter being acquainted with the terms of the original charter-party) can be allowed to have effect, so as to deprive the owner of his lien. If it could succeed, a gross fraud, as it seems to me, would be practised. By a contrary decision, we shall injure no one, for as to the sub-freighters, who are wholly unconnected with the charterer, it is quite immaterial to whom they pay the freight due for the conveyance of their goods, and as to the goods shipped by Colvins and Co., they must either stand in the same situation as those of the other freighters, or, if considered as the goods of Gooch and Sivrac, must be liable to pay the freight as per charter-party. The case of *Hutton v. Bragg* is very distinguishable from this. In that case, there was no connexion between the hire of the ship and the delivery of the cargo. But here, by the terms of the charter-party, there is. For the residue of the freight is stipulated to be paid upon the delivery of the home-ward cargo. I think, therefore, that the owner of the ship was entitled to a lien upon the goods put on board by the different shippers abroad, to the extent

*642] of *the freight due upon each of those consignments. The goods purchased by Colvins and Co., for Gooch and Sivrac, are in a different situation. I am of opinion, that as, between these parties, those are to be considered as the goods of Gooch and Sivrac, and in that case they are liable to the lien of the owner of the ship to the full extent of the freight due on the

charter-party. If this had been a question between Gooch and Colvins and Co., the case might have been different. Upon the third point, I am of opinion, that the owner of the ship is not entitled to any lien for the port-charges, and that, therefore, the verdict must be reduced to that extent.

BAYLEY, J. There is no authority for saying that the owner of a ship has a lien for port-charges, and where there is no usage on the subject, we ought not to determine in favour of a lien, unless it be clear, from the terms of the charter-party, that it exists. Now the stipulation as to the payment of the port-charges, is in a different part of the charter-party, from the clause relative to the payment of freight. If the parties had intended that there should have been a lien for these charges, the charter-party would have contained an express stipulation, that the remainder of the freight and two-thirds of the port-charges should be paid on delivery of the homeward cargo. That not being so stated, I am of opinion, that the plaintiff is not entitled to any lien on this head. Upon the general question, I have no doubt that the owner has a lien on those parts of the cargo belonging to Colvins and Co., and to third persons : by the very terms of the charter-party, that lien is given. Its extent, however, as to the goods belonging to third persons, is, by the case of *Paul v. Birch*, [*643 regulated and confined to the amount of the freight which the goods, when taken on board, were liable to pay. But it is contended here, that the fact of taking bills for the freight, payable after the delivery of the goods, deprives the owner of the ship of his lien. I think, however, that it is not so, and that if it were so, the greatest injustice would follow. Here Gooch hires the ship on freight, he stipulates that the freight shall be paid on delivery of the homeward cargo, he applies to have Sivrac appointed master, and the latter receives express instructions to make out the bill of lading for the homeward cargo, stipulating that freight shall be paid, as per charter-party. If he, therefore, had continued captain and done his duty, he never would have taken goods on board on which the owner would have no lien. But it appears, that, in India, Sivrac was removed, and a new captain appointed, and goods are taken on board, for which a bill of lading, differently worded, is made out. Now, at the time when all this was done, Colvins and Co. were fully acquainted with the terms of the charter-party, and knew that this was contrary to the duty which Sivrac owed to the plaintiff; and Bazett and Co. were also acquainted with this fact. Here the bills given for the freight have not been paid to Bazett and Co. by the owners of the goods. The case stands, therefore, in the same situation, as if those bills had not been given at all. And then no doubt can be entertained on the authorities, that the owner of the ship is entitled to receive the freight. As to the last point, I think that the plaintiff is entitled to a lien on the cotton shipped by Colvins and Co., to the extent of the freight due by the charter-party. For he is entitled to a lien to *that extent on the goods of Gooch and Sivrac. These goods, it appears, were [*644 bought by Colvins and Co. on account of Gooch and Sivrac. It is true the bill of lading describes Colvins and Co. as the shippers, and makes the goods deliverable to Bazett and Co., subject, as the goods of Gooch and Sivrac, to certain payments, before they could be delivered over to them. But it appears to me, that they are to be considered by the owner of the ship as the goods of Gooch and Sivrac, and liable to the freight. If the freight exceeds their value, there will be nothing for Bazett and Co. to receive; if not, they will have the preferable claim to the surplus. I think, after the delivery of these goods on board the ship, that they were no longer in the possession of Colvins and Co., but of Gooch and Sivrac, and that the plaintiff had a right so to consider them. On the whole, I think there must be judgment for the plaintiff, for the whole claim, with the exception of the sum due for port-charges.

HOLROYD, J. I am of opinion that the plaintiff is entitled to recover his whole demand, with the exception of the sum claimed for port-charges. These

charges would, if not specially provided for by the charter-party, fall on the owner of the ship. Then do they, by this charter-party, become freight, or in the nature of freight? I think not; and that the plaintiff is not entitled to a lien for them. As to the rest of the case, I think he ought to recover. I agree in the observations already made, as to the question relative to the lien on the goods shipped by third persons, and shall advert only to the goods purchased by Colvins and Co. on account of Gooch and Sivrac. It is contended, that these must be considered as the property of Colvins and Co. I think not; and [645] that they must be considered "as the property of Gooch and Sivrac, and as not continuing in the possession of Colvins and Co.; from their delivery on board the ship. Colvins and Co. might have a lien on them, but that would not deprive the owner of the ship of his, which, I think, must be considered as a prior lien on the goods. If it could, then the person who had a bare lien on the goods would be in a better situation than the owner of the goods himself. I think, therefore, that on these goods the plaintiff is entitled to a lien to the full extent of the freight as per charter-party.

BEST, J. I am entirely of the same opinion. The only question worthy of consideration is that relative to the goods shipped by Colvins and Co. I think, as between these parties, they must be taken to be the goods of Gooch and Sivrac, and liable to be detained for the payment of the general freight. The only interest in them which Colvins and Co. can have, is a lien for the debt due from Gooch and Sivrac to them. But if this could deprive the owner of the ship of his lien, then the creditors of Gooch and Sivrac would be placed in a better situation than Gooch and Sivrac themselves. I think this cannot be; and that they are only entitled to receive the surplus, after deducting the general freight due by the charter-party. The cases cited in argument only apply to disputes between the consignor and consignee as to the goods; but they do not affect the freights of the ship owner, which are, in this case, paramount to both. On the other points, I agree with the rest of the court.

Judgment for the plaintiff.

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*NONELL v. HULLETT and WIDDER.

A plea of foreign attachment stated the custom to be, that if the plaintiff in the Mayor's Court allege that any other person or persons owes or owe to the then defendants any money that may be attached, and that the plaintiff below alleged that he and another person owed to the defendant below a certain sum of money: *Held*, that such plea is bad, inasmuch as the person owing the money to the defendant must, within the custom as pleaded, be a different person from the plaintiff. *Quare*, whether a custom for a party to attach money in the hands of himself and partner, could be supported.

DECLARATION in assumpson for money had and received, money lent, &c. Plea, general issue as to all but 1058*l.*, and as to that sum, that the city of London, from time immemorial, hath been an ancient city, and that there hath been a custom, used and approved of within the city, that if any person affirm a plaint in debt against another in the Mayor's Court, upon such plaint, it hath been commanded to a serjeant at mace of the court to summon the defendant in such plaint, to appear in court to answer the plaintiff; and if such serjeant at mace return that the defendant had nothing within the city, whereby he can be summoned, nor is to be found within the city, and such defendant doth not appear; but makes default, and it be alleged by the plaintiff in the plaint, that *any other person* or persons owes or owe to any such defendant any sum amounting to the debt in the plaint specified, or any part thereof, then, on the petition of the plaintiff, it is commanded by the court to a serjeant at mace to attach such defendant by such sum of money being in the hands of such other person or persons. The plea then, after setting out this custom at length in the common form, stated, that the defendant Hullett, before the commencement of

this suit, affirmed a plaint against Nonell, the present plaintiff, for 5000*l.*, and upon Nonell's being summoned and not appearing, it was alleged by the said John Hullett, that he and Charles Widder owed to Nonell 2500*l.*, the proper moneys of Nonell; and that they then had the same in their hands, and, therefore the said John Hullett prayed process to attach Nonell by that sum so being in the hands of Hullett and Widder. The plea then stated the issuing of process to attach that sum, the appearance of the plaintiff, the officer's return, Nonell's non-appearance at four courts, as well as the issuing of process to warn John Hullett and Charles Widder, the garnishees, to appear to show cause why Hullett ought not to have execution of the money attached in their hands, their appearance and pleading that they had no money in their hands belonging to Nonell, upon which issue was joined, and the finding of the jury, that they Hullett and Widder had, at the time of issuing the attachment, 1058*l.*, belonging to Nonell, and judgment was given, that Hullett should have execution for that sum. The plea further stated the judgment and execution to be still in full force. To this plea there was a general demurrer and joinder.

Chitty, in support of the demurber. The plea cannot be supported; a party cannot attach money in his own hands; for he cannot be both plaintiff and defendant. In *Hope v. Holman*, 1 Brownlow & Goldebor. 60, the same objection was made, but the judgment proceeded on another point.

Bolland, contra. This is distinguishable from the case cited, for there a man had attached money in his own hands; here the money is in the hands of a different person, viz., of himself and his partner, and even as partners, they may be considered as different parties, having distinct interests and property. The practice has universally prevailed of attaching money under similar circumstances. The case of *Wetter v. Rucker*, 1 Brod. & Bing. 491, only decided, that money obtained under a foreign attachment is not a compulsory payment, so as to effect a discharge of the garnishee's debt, unless execution be executed. Here it was executed.

ABBOTT, C. J. The question in this case is, whether the defendants have brought themselves within the custom as pleaded by them, that is, as stated to be, that if any person affirm a plaint in debt against another, and it be returned, that the defendant in such plaint has nothing within the city, and it be then alleged by the plaintiff in the plaint that *any other person or persons owes or owe* to such defendant any money, then that that money may be attached. Here John Hullett was the plaintiff in the mayor's court; and upon its being returned, that Nonell had nothing within the city or liberties whereby he could be summoned, nor was to be there found, Hullett then alleged, that he and his partner had in their hands a sum of money belonging to Nonell, and then he prays that that sum may be attached. Now Hullett and his partner do not come within the description of "other person or persons," as stated in this plea. If it be the custom of London, that a man, having a separate debt due to him from another, may attach money in the hands of himself and his partner, belonging to that other, that custom should be so pleaded; and then the other party may deny the custom so put upon the record, and its validity may be solemnly argued. The custom pleaded in this case is, that the plaintiff in "the mayor's court may attach money in the hands of "other person or persons," but not that he may attach money either in his own hands, or money that is in the joint possession of himself and his partner. My present judgment, therefore, will not in any respect interfere with the customs of the city of London. All that I say is, that the facts disclosed in this plea do not bring the defendants within the custom as pleaded. There must be judgment for the plaintiff.

BAYLEY, J. I am of the same opinion; Hullett in this case was both plaintiff and defendant in the suit in the mayor's court. How could he have execution against himself? In *Wetter v. Rucker*, it was held, that money obtained

of a garnishee under a foreign attachment would not operate as a discharge of a debt due from the garnishee to the defendant in the mayor's court, unless a party were forced to pay it against his will. Now how can these defendants be said to have been compelled so to pay the money, when one of them institutes the suit in the mayor's court? I have great difficulty in saying that such a custom, if properly pleaded, could be supported. I agree, however, that the facts disclosed in the plea do not support the custom as pleaded; for, in order to bring the case within it, it must be shown that the plaintiff in the mayor's court and the garnishee are different persons. That not being so, I think, there must be judgment for the plaintiff.

Judgment for plaintiff. (a)

(a) See the following authorities, as to the manner the custom is pleaded with respect to the person having the money in his hands:—*Banks v. Self*, 5 Taunt. 234, in notes, “any other person”; *Morris v. Ludlam*, 2 H. Bl. 362, “any other person”; *Vidian's Entries*, 19, “Alqua alia persona;” 1 Rolle's Abridg. 554, “ascun autre.” So in the Year Book, 22 Edw. 4, *M.
*650] T. pl. 11, “ascunhome.” See Godbolt, 400, “one within the city,” and also Coke's Entries, 139. In Dyer, 83 a, *Robertson v. Norey King at Arms*, the recorder of London certifies, que, si home sue un aut devant le Maior, &c. et un tierce person est indebet a le defendant, in tant come le suite del plaintiff est, et per le custom de la ley d'attachment, le tierce person est condempne et judgement done envers lui, que nient obstant le judgement, si nul execution soit sue envers le tierce person, le plaintiff pot resorber a aver judgement et execution envers le defendant, esteant son principal detteur, et il auxy pot suer le tierce person pur son det, nient obstant le judgement unexecut,” &c.

BINNINGTON v. WALLIS.

Declaration stated that plaintiff had cohabited with defendant as his mistress, and that it was agreed that no further immoral connexion should take place between them, and that defendant should allow her an annuity as long as she should continue of good and virtuous life and demeanour; and thereupon, in consideration of the premises, and that plaintiff would give up the annuity: defendant promised to pay as much as the annuity was reasonably worth. Held bad; upon general demurrer.

DECLARATION stated, that before the making of the promise and undertaking, the plaintiff had cohabited with the defendant as his mistress; and an immoral connexion and intercourse had existed between them for a long space of time, to wit, for the space of twelve years; and the plaintiff had thereby been greatly injured in her character and reputation, and deprived of the means of honestly procuring a livelihood; and that, before the time of the making of the promise, to wit, on the 1st of January, 1816, at &c., the plaintiff wholly ceased to cohabit with the said defendant, as his mistress, and to have any immoral intercourse with her, and thereupon it was determined and agreed between them, that no immoral intercourse or connexion should ever again take place between them; and that the defendant, as a compensation for the injury so sustained by the plaintiff, should pay and allow to the plaintiff, the quarterly sum of 10*l.*, while she should be and continue of good and virtuous life, conversation, and demeanour: and thereupon, in consideration of the premises, *and that the plaintiff, at the request of the defendant, would resign and
*651] give up the said quarterly sum, he undertook to pay her so much money as the said quarterly sum was reasonably worth, in order to enable her to continue to live in a virtuous and decorous manner. The declaration then averred, that the plaintiff did resign and give up the said quarterly sum, and the same from thence wholly ceased and determined; and that she had always, from the time of the cessation of the immoral connexion, lived in a virtuous and decorous manner, and been of virtuous life, conversation, and demeanour. It then averred, that the quarterly sum was reasonably worth 400*l.*; and then alleged as a breach, non-payment by the defendant. The other counts omitted any mention of the quarterly allowance, and in other respects were similar to this. To this declaration, there was a general demurrer.

Parke in support of the demurrer. There is no sufficient consideration to

support the promise laid in this declaration. It is not stated that the plaintiff was seduced. There is not even a moral obligation to provide for a woman for past cohabitation. As to the giving up of the annuity, mentioned in one count, that depends upon the same question, for the only consideration for that annuity was the past cohabitation.

Holt, contra. There was a moral consideration for the promise stated in this declaration, for it must be taken (as the contrary does not appear,) that the defendant seduced the plaintiff, and if that be so, he was morally bound to make some provision for her. In *The *Marchioness of Annandale v. Harris*, [*652] 2 Peere W. 433, the court held a bond given to a seduced woman, good; and if it were sufficient to support a bond, it must be equally so to support an express promise. So also past cohabitation was deemed sufficient consideration for a bond, in the case of *Carew v. Stafford*, there cited; and in the case of *Turner v. Vaughan*, 2 Wils. 339. And secondly, there is a valuable consideration in this case, inasmuch as the plaintiff gave up her annuity.

Per Curiam. The declaration is insufficient. It is not averred that the defendant was the seducer, and there is no authority to show that past cohabitation alone, or the ceasing to cohabit in future, is a good consideration for a promise of this nature. The cases cited are distinguishable from this, because they are all cases of deeds, and it is a very different question, whether a consideration be sufficiently good to sustain a promise, and whether it be so illegal as to make the deed which required no consideration void. There must therefore be judgment for the defendant.

Judgment for defendant.

PHILIPS v. MORGAN, Esq.

Practice.

In this case a testatum fieri facias had been issued, returnable in last Hilary term, directed to the late sheriff of Carmarthen, commanding him to levy the sum of 85*l.* 17*s.* A rule to return this writ was obtained in Easter term, and he then returned that he had seized *goods of the defendant, value unknown, which remained in his hands for want of buyers. A writ of non omittas distingas was afterwards issued, returnable on Wednesday next after five weeks of Easter, directed to the present sheriff, commanding him to distrain the late sheriff, so that he expose to sale the goods taken by him in execution. Upon a rule to return that writ, the present sheriff returned that he had distrained to the value of forty shillings.

Littledale now moved to increase issues, upon an affidavit, stating these facts, and also that, in consequence of this delay, further costs had been incurred, for which, he contended, the late sheriff was liable; and he cited *Raban v. Plais-tow*, 5 Burr. 2727. The court ordered him to take 100*l.* for that purpose.

Rule absolute.

DOE v. ROE.

Practice.

COURTHORPE moved for judgment against the casual ejector. It appeared, from the affidavit, that the tenant in possession resided abroad, and carried on his business by an agent residing on the premises. The service was by delivering the declaration in the usual way to the agent, and also fixing it up on the premises.

The court held this to be sufficient.

Judgment accordingly.

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***LEWIS and Others v. OWEN.**

A bill of exchange drawn by defendant in Ireland, and accepted and paid by plaintiffs in England, is a debt contracted in England, and cannot, therefore, be discharged by a certificate under an Irish commission of bankruptcy.

THIS was a rule to show cause why an exoneretur should not be entered on the bail-piece, the defendant having obtained his certificate under a commission of bankruptcy in Ireland. It appeared from the affidavits, that the debt for which the action was brought, arose from the plaintiffs, while residing in England, accepting and paying bills of exchange drawn upon them by the defendant, while residing in Ireland, for his accommodation.

Campbell showed cause, and insisted, that this was a debt arising in England, and that it therefore could not be barred by the Irish certificate. For this purpose, Ireland must be considered a foreign country. He relied upon *Smith v. Buchanan*, 1 East, 6, and *Quin v. Keefe*, 2 H. Bl. 553.

Marryat and *Chitty*, contra, contended, that as the bills were drawn in Ireland, the debt was to be considered as having arisen there; and at any rate, that since the union, Ireland could not be considered a foreign country. Therefore, what discharged the defendant from the debt, in a part of the united kingdom, must discharge him from it throughout the whole.

But the court said the debt must be considered to have arisen where the money was paid; and that a certificate under a commission of bankruptcy in Ireland, since *the union with that country, could have no greater operation than a certificate under a Scottish sequestration, which was never thought to discharge a debt contracted in England.

Rule discharged.*

* [See 13 Mass. Rep. 1, *Blanchard v. Russell*, and cases there cited; Ibid. 18. 19.]

BUTT, Clerk, v. HOWARD and Another.

Where a declaration in debt for tithes under 2 and 3 E. 6, c. 13, s. 1, omitted to state that the tithes had been yielded and paid, and of right ought to have been paid within 40 years next before the passing of the act: Held, that it was defective, even after verdict, and the judgment was arrested.

DEBT under 2 & 3 Ed. 6, c. 13, s. 1, for the treble value of tithes. The cause was tried before GRAHAM, B., at the last assizes for Suffolk, when a verdict was found for the plaintiff on the third count of the declaration, which stated, that the defendants being occupiers of certain lands within the parish of Lakenheath, and whilst the plaintiff was vicar and proprietor of the tithes, and whilst the defendants were so occupiers of the said land, to wit, on, &c., at, &c., did dig up a certain large quantity of potatoes, to wit, 100 pounds of potatoes, then growing upon the said land, the tithe whereof belonged to the plaintiff, and of right ought to have been set out and paid to him as such vicar and proprietor, to wit, at, &c. Yet that defendants being subjects of this realm, and well knowing the premises, but not regarding the statute in such case made and provided, nor fearing the penalties therein contained, after the digging up of the potatoes, and before the commencement of this suit, to wit, on, &c., at, &c., did take and carry the said potatoes from the said land, where the same had been so grown, and dug up, and where the same ought to have been tithed, the tenth part thereof, or of any part thereof, not having been *separated, divided, and set out from the nine parts thereof, nor any composition or agreement made for the tithes thereof, or of any part thereof with the plaintiff, contrary to the form of the statute, in such case made and provided. Averment, that the tenth part of the potatoes, so taken and carried away, at the time of taking and carrying away the same, was reasonably worth a large sum of money, to wit, &c. whereby, and by force of the statute, in such case made and

provided, an action had accrued to the plaintiff, &c. *Scarlett*, in last Easter term, obtained a rule nisi for arresting the judgment on this count, on the ground that it contained no averment, that the tithes had been yielded and paid, and of right ought to have been set out and paid in kind, to the farmer or proprietor thereof, within 40 years next before the passing of the statute of 2 & 3 Ed. 6, c. 13, s. 1. And now,

Blossett, Serjt., and *Storks* showed cause. The averment is unnecessary, and even if necessary, the defect is cured by the verdict. It is quite clear, that the averment need not be proved, if made. In *Mitchell v. Walker*, 5 T. R. 263, Lord KENYON says, "The usage has constantly been against the necessity of the proof contended for by the defendant under the statute. And I remember many actions tried, where the lands, in respect of which the tithes were claimed, were lately enclosed, and where the same objection, had it been available, must have prevailed, but the plaintiffs recovered in all of them." And again he adds, "The non-payment of tithe of itself signifies nothing. Tithe is every day claimed out of wastes which never paid *tithe before." [**657] Now if it be decided, that it needs not be proved, that is a strong argument to show that it is not necessary to make the averment. The reason is, that the 40 years can by no possibility become material. For the parson relies on his prescriptive right to tithe, and the defendant, to exempt himself, must also set up a prescription. The statute is therefore, in fact, general, and gives the remedy in all cases where the lands are titheable. The mention of the 40 years is only in consequence of the canon law prescription, which depended on that period of time. And so it is stated by Lord Coke in 2 Inst. 653. It might as well be contended, that the plaintiff must state himself to be a liege subject of the king, which is the description in the statute. The statute is a remedial act, *Lord Selsea v. Powell*, 6 Taunt. 297. But supposing this to be a necessary averment, the want of it is no objection after verdict. In *Alston v. Buscough*, Carth. 304, the declaration omitted to state, that defendant had not made any agreement with the plaintiff for the tithes. But it was held, that although this would have been ill on demurrer, it was helped by the verdict. And that is a stronger case than the present. Besides, here the declaration does state, that the tithes ought to have been set out, and, that defendant did not set them out *contrary to the form of the statute*, which is in effect making the averment in question.

Scarlett and *Dover*, contra, were stopped by the court.

BAYLEY, J. This is the first instance which I ever saw of a declaration under the statute, upon the 2 & 3 *Edw. 6, c. 13, in which there was not an allegation that tithes had been paid or payable within 40 years next before the passing of the act of parliament. That statute, it should be observed, introduced a new remedy for the non-payment of tithe, and in terms confines that remedy to such predial tithes as had been yielded and paid within 40 years next before the act, or of right or of custom ought to have been paid. Now *prima facie* those words must have some meaning, and must have been intended to restrain the operation of the statute to some particular tithes. And I think, that, unless that be so, it will be difficult to account for the opinions delivered by different judges with respect to this act. In *Lord Mansfield v. Clarke*, 5 T. R. 264, n. a, *WILMOT*, C. J., speaking of the averment that tithes had been payable, says, "This seems to be a necessary averment;" and in that case the declaration was amended, for the purpose of introducing it. Now that would not have been done, if the allegation had been, as it is now contended to be, wholly immaterial. And the observations of *YATES*, J., in *Kynaston v. Clark*, 5 T. R. 265, n. a, afford the same argument. The case of *Mitchell v. Walker* is quite consistent with this, for there the declaration did contain the averment, and there can be no doubt that the fact might be presumed if the land was titheable, and nothing appeared to show that the tithe had originated since the period mentioned by statute. A case may be put in which a party having lands free

from tithes, might have granted them 30 years before the statute. If so, all the allegations in this declaration might be true, and yet the party would not be entitled to this remedy. I think, therefore, that *this was a necessary allegation, and not being contained in this declaration, I am of opinion, that on that ground the judgment must be arrested.

HOLROYD, J. I am also of opinion, that, in this case, the judgment must be arrested, upon the ground that the allegation omitted in the declaration is one required by law to be made. The uniform course of the precedents has been to insert it, and, on various occasions, it has been considered by the judges as a necessary averment. But it is said, that the objection, if any, is cured by verdict. I am, however, of a different opinion, for all the facts necessary to bring the case within the powers of the clause must be stated. In an action on the game laws, it is necessary to allege, that the party charged with having used a dog, &c., was not qualified to use it; and in *Spieres v. Parker*, 1 T. R. 145, it is laid down by the court, that, even after a verdict, such an omission is fatal. But it is said, that it is averred here, that the defendant carried away the tithe contrary to the form of the statute, and that that allegation is sufficient. I think that is not so. The court are to judge whether the facts stated are contrary to the statute, and it is not to be taken after verdict that facts are proved, which not being stated in the declaration, it could not be necessary to prove at the trial. As to the general point, the import of the statute seems to me to be confined to particular tithes, and not to extend to all predial tithes. The statute, as it seems to me, excludes cases where the right to tithes originated within 40 years before or at any time after the passing of the act. Now *such a right might have originated since the period fixed; for lands tithe-free may, either by agreement founded on a valuable consideration, or sanctioned by an act of parliament, have become liable to pay tithes; those cases, however, would not fall within the words of the act. The court, therefore, ought to have contained this allegation, and not containing it, the judgment must be arrested.

BEST, J., concurred.

Rule absolute.(a)

(a) Abbott, C. J., was absent.

The KING v. The Inhabitants of ST. LAWRENCE, LUDLOW.

Where a pauper, legally settled in the parish of A., having met with a severe accident in the parish of B., was carried into an adjacent parish to be cured, and remained there for a long period of time: Held, that he was to be considered as casual poor in the parish of C., and was irremovable; and that an order of removal to A., suspended, under the powers of 35 G. 3. c. 101, and a subsequent order on the overseers of A. to pay the intermediate charges incurred by the parish of C., were invalid.

Two justices, by their order, removed George Thomas from the parish of St. Lawrence, Ludlow, to the parish of Leinthall Starks, in the county of Salop. The sessions, on appeal, discharged the order, subject to the opinion of this court on the following case. On the 31st of October, 1818, George Thomas, the pauper, was sent with his master's team for coals, and, on the road, in the parish of Bromfield, was thrown down by the horses, by which means his thigh was fractured. The accident took place about half a mile from Ludlow, in the parish of Bromfield. A person passing by with an empty wagon took the pauper to Ludlow, to the Bell Inn, which is in the parish of St. Lawrence, Ludlow, *where the pauper was taken in, and where he remained for the space of fourteen weeks, during which time he was attended by a surgeon, who reduced the fracture. The overseers of Ludlow came to the Bell the same day, and examined the pauper, and directed the mistress of the house to take care of him: They also were present when the surgeon was there. On

the 4th November, an order of removal was made by the magistrates, removing the pauper to the parish of Leinthall Starks, his place of settlement. There was also an order of suspension made at the same time. On the 17th of July following, an order for the charges incurred by St. Lawrence, Ludlow, was made, under the power given by the 35 G. 3. 101. It was objected, that, under the facts above stated, the magistrates had no power of removal, and the sessions being of that opinion, discharged the orders.

Pearson, in support of the order of sessions. 'The case of *Rex v. St. James*', in *Bury St. Edmunds*, 10 East, 25, is directly in point. And no solid distinction can be taken on the ground that here the parish of St. Lawrence, Ludlow, was not the place where the accident happened; for wherever the pauper, in consequence of that accident, is found in an indigent state, he is to be considered as casual poor. *Lamb v. Bunce*, 4 M. & S. 277. Here the pauper was to be considered as casual poor in St. Lawrence, Ludlow, and consequently was not removable. For none can be removed, by 13 & 14 Car. 2, c. 12, except those who are "coming to settle."

W. E. Taunton, contrâ. In the case of *Rex v. Birmingham*, 14 East, 252, the authority of 'The case of *Rex v. St. James*', in *Bury St. Edmunds*, which was a [*662] novel decision, was somewhat shaken. There the pauper could hardly be considered as "coming to settle" in the parish of Feckenham, and yet the court held that she was removable. In 'The case of *Rex v. St. James*', in *Bury St. Edmunds*, the pauper only came into the town with a temporary purpose, and meaning to return immediately. He did not, therefore, come *animo morandi*. But here the pauper did come with an intention of staying; for he came into the parish to be cured of his sickness. Suppose a person goes into a town to assist in the execution of some public work, as, for instance, the building of a church, or the like, and during his stay, becomes chargeable. Is he to be considered as irremovable, because he is not coming to settle? Surely not. The expression, "coming to settle," is very vague and indefinite, and is sufficiently satisfied by a party coming into a town with an express intention of staying some time, or under circumstances from which such intention must necessarily be presumed.

ABBOTT, C. J. I am of opinion, that in this case the sessions were right in holding that the pauper was irremovable. The case of 'The case of *Rex v. St. James*', in *Bury St. Edmunds*, seems to me to have been most correctly decided, and I do not think the present case materially distinguishable from it. But it is said, that '*Rex v. Birmingham*' is at variance with its authority. I am not of that opinion; but if it were necessary to decide between the two cases as conflicting authorities, I should adhere to the opinion of the court in 'The case of *Rex v. St. James*', in *Bury St. Edmunds*. For the statute 13 & 14 Car. 2, c. 12, only gave a power of removal of those paupers who were coming to settle. Now how can it be said that this pauper was coming to settle in St. Lawrence, Ludlow? *Nor does the 35 G. 3, c. 101, make any difference; for previously [*663] to the passing of that act, a pauper under these circumstances could not have been removed. And that act only regulated the powers of removal already existing, but did not give any new power to the magistrates for removing paupers who were irremovable before. The order of sessions is therefore right, and must be confirmed.

Order of sessions confirmed.

**CHEAP and Others, Assignees of BRANDER and BARCLAY, Bankrupts, v.
CRAMOND.(a)**

A merchant in London recommended consignments to a merchant abroad, and it was agreed that the commissioners on all sales of goods recommended by one house to the other should be equally divided, without allowing any deduction for expenses: *Held*, that this was a participation in profit, and constituted a partnership between the parties *quoad hoc*.

DECLARATION for work and labour by the bankrupts, before their bankruptcy, in drawing and making out policies of insurance, and in and about causing divers persons to insure ships and goods; and for premiums advanced, &c.; counts for money lent, money had and received, and upon an account stated. Plea, general issue. The cause was tried before BEST, J., at the London sittings, before Michaelmas term. The bankrupts, who were merchants in London, recommended the defendant to consign goods to the house of Ruxton and Co., at Rio Janeiro, for sale; the latter were to remit the proceeds to the bankrupts, who were to pay over the same to the defendant. The bankrupts, upon receiving advices from Ruxton and Co. that the goods were sold, advanced money to the defendant, on account, to recover which this action was brought; Ruxton and Co. afterwards failed without remitting the proceeds. It appeared, however, that the bankrupts and Ruxton and Co. divided equally the commissions on the *sale of all goods recommended by the one house to the other. Upon this it was argued, that the bankrupts were partners *quoad hoc* with Ruxton and Co., and that the receipt of the proceeds of the goods was, therefore, a receipt by the bankrupts, and the advance by them to the defendant was a payment on account, for which they were liable. The learned judge was of that opinion, and the jury found a verdict for the defendant. A rule nisi for a new trial having been obtained in last Michaelmas term, on the authority of a case of *Muirhead v. Salter*, it which it was said, the Court of Common Pleas had decided that a division of commission between insurance brokers did not constitute a partnership.

Marryat and *Puller* showed cause. It is a well established principle of law, that a participation in the profits of a trade constitutes a partnership, so as to make the parties participating in such profits liable as partners to other persons. Now here there was clearly a division of profits between the two houses, as to all consignments recommended by the one house to the other; for the commissions constituted the whole profit. *Waugh v. Carver*, 2 H. Bl. 235, is an authority expressly in point. There, two ship-agents at different ports entered into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c.; and they were held liable, as partners, to all persons with whom either contracted as such agent; although the agreement expressly provided, that neither should be answerable for the acts or losses of the other. The case of *Muirhead v. Salter* is not reported. It does not appear that the motion "for a new trial was made, on the ground that the jury ought to have considered the division of the commissions between the insurance brokers, as a participation of profits. The profits of an insurance broker arise only in part from his commission; a very large proportion of his profits arises from a per centage he receives from the underwriters, upon the gross amount of the payments he makes to them.

Scarlett and *Campbell*, contrâ. It may be admitted, that a participation in the profits of a trade constitutes a partnership as to third persons. It will appear, however, from all the authorities on the subject, that the participation should be in the profits. In *Ex parte Hamper*, 17 Ves. 404, Lord ELDON lays it down, that if a trader agrees to pay another person, for his labour in a con-

(a) This case was argued at the sittings before Easter term.

cern, a sum of money even in proportion to the profits equal to a certain share, that will not make him a partner. In *Bloxham v. Pell*, (a) the outgoing partner was to have, besides interest for his capital, an annuity of 200*l.* for six years, *as in lieu of the profits of the trade*, and in *Grace v. Smith*, 2 Sir W. Black. 998, De GREY, C. J., speaking of money left behind in trade by a retiring partner, says, "The true criterion is, to inquire whether the retiring partner agreed to *share the profits* with the remaining partner, or whether he only relied on those profits as a fund of payment." In the case too of *Waugh v. Carver*, 2 H. Bl. 235, the agreement was, in effect, for a share of the profits; for it was expressly stipulated in that case, that one-fifth part of the commission on each ship should be retained, as a full compensation for clerks, and other incidental charges and expenses, after *which deductions, the then remaining balance of commission should be divided. In that case, the gross proceeds were the entire commissions received. The expenses of carrying on the business were estimated at a sum equal to one-fifth of the commissions generally earned. The residue was clear profit, and it was that profit which the parties were to share. There, likewise, there was a participation in the profit arising from the discount on tradesmen's bills and other dealings of the two houses. But in this case, the parties were to share the gross proceeds of the business, and not the profits, for, as factors, they had to pay the expenses of clerks, of warehouses, &c. The commission was the source only from which the profits were to arise. The profit is the surplus which remains, after deducting all expenses. In *Dixon v. Cooper*, 3 Wils. 40, it was held, that a factor who sold for the plaintiff, and was to have one shilling in the pound upon the sale, was a good witness to prove the contract; and in *Benjamin v. Porteus*, 2 H. Bl. 590, a person employed to sell goods, and who was to have for himself whatever money he could procure for them beyond a stated sum, was held to be a competent witness to prove the contract between the seller and buyer. According to the argument on the other side, in both these cases, the broker participated in the profit, and was, therefore, a partner, and, consequently, was interested, and if so, not a competent witness. The proposition contended for on the part of the defendant goes to this extent, that if a party, with or without consideration, gives to another a share in commissions, he makes the donee a partner: and so it would be the case with every person who is paid for his trouble by a per centage; and thus, ship-brokers who are paid in that mode by a per centage on the freight, or surveyors, who are paid by a per centage on the tradesmen's bills, might be considered partners. In *Muirhead v. Sutler*, (b) the Court of Common Pleas held, that a division of the commissions on effecting particular policies between insurance brokers, did not constitute a partnership. That case was tried before the late Lord C. J. GIBBS, who told the jury, that the division of the commissions did constitute a partnership. They found, however, against his direction, and that great judge, with his brethren, afterwards thought, that the jury were right, and refused to disturb their verdict.

Cur. adv. vult.

The judgment of the court was delivered in the course of this term by

ABBOTT, C. J. This cause was tried at Guildhall, before my brother BEST, and a verdict under his direction found for the defendant. A motion was afterwards made for a new trial, and a rule to show cause having been granted, the case was very elaborately argued before us at this place, before last Easter term. The real question in the cause is, whether the bankrupts, who were merchants in London, are to be considered as partners with the house of Ruxton, at Rio Janeiro, with reference to the transaction in question. The action is for money had and received to the use of the bankrupts. The facts are these. The defendant having occasion to send goods to Rio Janeiro, for sale there, applied to the bankrupts for recommendation to a house at that place; they recom-

(a) Cited in *Grace v. Smith*.

(b) Not reported.

*668] mended Ruxton, and the goods were consigned *to him. Ruxton was to remit the proceeds in money or goods, to the bankrupts, who were to pay over the money to the defendant, or sell the goods, and account to him for the proceeds. The correspondence was carried on between the bankrupts and Ruxton, the defendant not communicating directly with Ruxton. The latter sold the goods, and having advised the bankrupts thereof, they advanced a sum of money to the defendant in anticipation of the remittance expected from Ruxton, and the latter having failed, and made no remittance, this action was brought to recover the money so advanced. And if there had been nothing more in the case, the plaintiffs had an undoubted right to recover. But it came out at the trial, that the bankrupts and Ruxton were in the habit of dividing equally the commissions received by each other on the sales of all goods recommended, or "influenced" according to the expression of the witnesses, by the one house to the other; and according to this habit and course of dealing, the bankrupts were entitled to half the commission received by Ruxton, on the sale of the defendant's goods, and he would be entitled to one-half of the commission, if any, charged by them, on their receipt of the proceeds in London, had the proceeds been duly remitted. And upon this evidence, it was contended on the part of the defendant, that the bankrupts were to be considered as joint factors, or partners, *quoad hoc*, with Ruxton; and consequently that his receipt was in effect a receipt by them, and so the advance of the money by them to the defendant was, in effect, merely a payment of money for which they were previously accountable to him. And in support of this proposition, the case *669] of *Waugh v. Carver*, 2 H. Bl. 235, *was cited and relied on. And we are all of opinion, that the present case cannot be distinguished in principle from that, and that our decision must be governed by it. It is true, that in that case a definite part of the commission was, by agreement of the parties, to be deducted as compensation for the charges and expenses before a division took place; and also that each party was to share in some specified measure with the other, in other parts of the profits of their respective business, such as warehouse rent, and discount upon tradesmen's bills. And it was contended, in this case, on the part of the plaintiffs, that the bankrupts and Ruxton were to be considered as dividing the gross proceeds only, and not the net proceeds or profits of each other's agency or factorage; and that a division of gross proceeds does not constitute a partnership. We think, however, that the previous deduction of a definite part of the commission before the division in the case cited, is an unimportant fact. It cannot have the effect in all cases of leaving the remainder as clear profit, because the expense and charge cannot be in all cases uniformly the same, but must vary with the particular circumstances of each transaction; so that in effect a part only of the gross commission, or proceeds of the agency, and not the whole, was to be divided in that case; and taking the definite deducted part at a fifth, or any other aliquot part, the absent house, instead of receiving one-half, as in the case at bar, would, by the agreement, receive two-fifths, or some other definite part of the whole gross sum, and not an indefinite part thereof, depending upon the actual and clear profit of the transaction. And although, in the case of *Waugh v. Carver*, the agreement was not confined to a division of the commission, but extended also to the *670] moneys received in certain other parts of the transactions of the "two houses, yet the principle of the decision is not affected by that circumstance, the principle being, that where two houses agree that each shall share with the other the money received in a certain part of the business, they are, as to such part, partners with regard to those who deal with them therein, though they may not be partners *inter se*. By the effect of such an agreement, each house receives from the other a part of that fund on which the creditors of the other rely for payment of their demands, according to the language of Lord Chief Justice DE GREY, in the case of *Grace v. Smith*, 2 Sir W.

Black. 998. And such an agreement is perfectly distinct from the cases put in the argument before us, of remuneration made to a traveller, or other clerk or agent, by a portion of the sums received by or for his master or principal in lieu of a fixed salary, which is only a mode of payment adopted to increase or secure exertion. It is distinct also from the case of a factor receiving for his commission a per centage on the amount of the price of the goods sold by him, instead of a certain sum proportioned to the quantity of the goods sold, as was the case of *Dixon v. Cooper*, 3 Wils. 40, wherein it was held, that the factor was a competent witness to prove the sale. It differs also from the case of a person receiving from a trader an agreed sum, in respect of goods sold by his recommendation, as one shilling per chaldron on coals, or the like, for there there is no mutuality, and such a case resembles a payment made to an agent for procuring orders, and has no distinct reference in the terms of the agreement to any particular coals purchased by the coal-merchant for resale upon which a third person may become a creditor of the coal-merchant, and probably could not in any instance be shown to apply in its execution to any such particular purchase. But it is to be observed, that, even on a case of this nature, the inclination of Lord MANSFIELD's opinion, in *Young v. Axtell*, (cited 2 Hen. Bla. 242,) was that such an agreement might constitute a partnership. Of the case of *Muirhead v. Salter*, referred to in the argument, we have neither the facts nor the ground of decision brought before us with sufficient accuracy, to enable us to consider it as an authority on the present question. It may have been, that the division of the commission between the two insurance brokers was a solitary instance; that the assured had recognised the second broker, as being the person employed by himself; or that the court did not think fit, under all the circumstances of the particular case, to disturb the verdict of a jury of merchants as to the effect of a division of the commission in that particular species of agency, the divided commission being, as I understand, payable for effecting the policy, and not for receiving the money from the underwriters, in the event of the loss, and payable whether any loss had occurred or not. So that we cannot consider that case as having contravened or weakened the authority of the decision in *Waugh v. Carver*. Upon the authority of this latter case, and for the reasons already given, we think the direction of the learned judge at the trial, and the verdict of the jury, are right, and that the rule for a new trial ought to be discharged. But as it has been strongly urged, that our decision in the present case will be of most extensive consequence upon foreign commerce, although we are by no means convinced that such is really the fact, we will allow the rule to be drawn up, to set aside the verdict, and enter a nonsuit, if the plaintiffs desire it, in order to afford them an opportunity of putting the facts upon the record.

[*672
Rule discharged.

DOE, on the Demise of LEWIS and Others, v. BINGHAM.

By deed a mortgage conveyed to the mortgagor the legal estate, upon being paid the mortgage-money, and the latter reconveyed it to trustees for the purpose of securing an annuity. At the time of the execution by the mortgagee, there were several blanks in the deed, but not in that part which affected him. The blanks left were for the sums to be received by the mortgagor from the grantees of the annuity, and were all filled up at the time of the execution of the deed by the mortgagor; but several interlineations were made in that part of the deed, after the execution by the mortgagee. It was held, that the deed was not therefore void, but operated as a good conveyance of the estate from the mortgagor to the trustees for the payment of the annuity.

Held, also, that it was not incumbent on the plaintiff in ejectment brought on this deed, to prove that the annuity was duly enrolled.

Held, also, that the tenant in possession was not competent to prove that the witness, and not the defendant, was the possessor of the land.

EJECTMENT upon two demises. First, of Lewis, secondly, of Boston and Kilvington. Plea, not guilty. The cause was tried at the Hants' Summer ass-

sizes, 1820, before GRAHAM, B. The defendant was a beneficed clergyman, and the premises in question were his glebe, upon which, until December, 1815, one Richard Lassam had been the mortgagee. In order to prove the plaintiff's case, a deed, bearing date 23d December, 1815, was produced, which appeared, by the certificate of the proper officer endorsed thereon, to have been enrolled, but no enrolment was produced. The deed was in five parts; the defendant of the first part, Thomas Woodham and John Dunn of the second part, Richard Lassam of the third part, James Boston and James Kilvington of the fourth part, and Benjamin Lewis of the fifth part. The general object of the deed was to discharge the premises of a mortgage to Lassam's trustees, who were Woodham and Dunn, and to vest the legal estate in Lewis, as the trustee of Boston and Kilvington (who had advanced 3000*l.* to the defendant) as a security for the payment of an annuity of 450*l.* to *the latter, during the defendant's life and incumbency. It was proved, that this deed was executed by Lassam and his two trustees, on the 21st of December, and Lassam thereby acknowledged the receipt of his mortgage-money, and he and his trustees surrendered their legal estate in the premises; and then Bingham conveyed the fee to Lewis, the trustee of Boston and Kilvington. At the time of the execution of the deed by Lassam and his trustees, there were several blanks left in it, but there were none in that part of it which related to Lassam's mortgage. The blanks left were for the sums to be received and paid by the defendant, and several interlineations were also made in that part of the deed, after Lassam and his trustees had executed the deed. The execution by Bingham took place on the 23d December, 1815, at which time the blanks were all filled up. It was objected by the defendant at the trial, first, that these alterations and interlineations avoided the deed in *toto*, and consequently, that the lessors of the plaintiff, who claimed under it, had not the legal estate in them; and, secondly, that it was necessary for the plaintiff, not only to produce the deed, but also to produce the enrolment of it, as required by the annuity act. Both these objections were overruled. The defendant further tendered his daughter as a witness, to prove, that she was tenant in possession of the premises. The learned judge rejected her testimony. A rule nisi for a new trial having been obtained in last Michaelmas term upon the objections taken at the trial,

*673] *Pell, Serjt., and A. Moore* now showed cause. This deed was complete, as a conveyance to the lessor of the plaintiff, at the time when the defendant executed it. It *operated differently as to the mortgagee and the defendant, viz., as to the mortgagee, as a surrender of his interest, and as to the defendant, as a conveyance of the legal estate to the lessors of the plaintiff. The interest of the mortgagee was not affected by the alterations, and therefore the alterations were, as to him, immaterial. Besides, the defendant is estopped, by his executing the deed, from saying that it is different from what it purports to be. It was not necessary for the plaintiff, in this case, to prove the enrolment of the annuity. If the defendant meant to insist that the deed was void, in consequence of some defect in the memorial, it was for him to substantiate that by proof. *Doe v. Mason*, 3 Campb. 7, is an authority expressly in point.

Scarlett, Chitty, and R. Scarlett, contrâ. The plaintiff is to recover on the strength of his own title, and in this case insists, that the person having the legal estate, had conveyed that to him by executing a deed; that deed is entire, relating to one subject matter, viz., the securing of the annuity. If it is bad in part, it is bad in the whole. *Pigott's case*, 11 Rep. 26, is an authority to show, that where any deed is altered in a part material, even by a stranger, whether it be by interlineation, addition, rasing, or by drawing a pen through the midst of any material word, it becomes void; and 2 Roll's Abr. 29, pl. 29 is a strong authority to the same effect. In *Denn v. Dollman*, 5 T. R. 641, A being entitled to a life-estate, subject to a condition not to charge or encumber it, granted

an annuity, and demised the land as a security ; but there being a defect in the memorial of *the annuity, the court held, that the whole deed was void [*675 to all intents and purposes, even though the other parts of it were not connected with the annuity. That case is an authority expressly in point. Secondly, it was incumbent on the plaintiff to show, that the annuity was duly enrolled, for his title depends upon it. In the case of a bargain and sale by deed enrolled, it is not enough to put in and prove the deed, but it is also necessary to produce and prove the enrolment ; and that is an analogous case to the present. As to the third point, the witness ought to have been received, for her testimony would subject her to the ejectment, and to the action for mesne profits. It was not, therefore, her interest to prove herself tenant in possession.

BAYLEY, J. It seems to me that this deed, notwithstanding the interlineations, and the filling up of the blanks subsequently to its execution by Lassam, was still valid, so as to convey the property from the defendant to the lessors of the plaintiff. The whole deed may be considered as one entire transaction, operating, as to the different parties to it, from the time of the execution by each, but not perfect till the execution by all the conveying parties. I am of opinion, that any alteration made in the progress of such a transaction, still leaves the deed valid as to the parties previously executing it, provided such alteration has not affected the situation in which they stood. In this case, it appears, that there had been upon the property a mortgage to Lassam, for a term of years, for 1000*l.* Boston and Kilmington, two of the lessors of the plaintiff, agreed to advance Bingham 3000*l.*, he granting them an annuity of 450*l.* per annum ; now in order to make this security valid, it was *necessary that there should be a conveyance from Lassam of his interest, and the form in which that was effected, was, by [*676 taking a conveyance in fee from Bingham, and a surrender from Lassam of his interest. The deed therefore as to Lassam and Bingham, operates in a different manner. As to the former, it extinguishes his term, and by so doing, vests the fee in Bingham. Then it is that the deed is proposed to Bingham to be executed, and before he executed it, the alterations in question were made. Now at that time the deed was not perfect in all its parts. As against Lassam it was complete. But with respect to the other parties, it was in progress only, and the alterations made were only for the purpose of rendering it conformable to their wishes. There is no authority which says, (and it would be contrary to common sense, if there were one,) that an alteration so made and not operating upon the provisions of the deed, relating to the parties who had previously executed it, should avoid it. Here the alterations do not in any respect touch the part of the deed affecting Lassam. As to him, therefore, they are alterations made in an immaterial part of the deed, and being made whilst the deed was in progress, our decision does not clash with any of the authorities cited. I think, therefore, that the deed was valid. As to the second objection, that the enrolment of the memorial was not produced, I am of opinion that such production was not necessary. It was sufficient for the lessors of the plaintiff to produce the deed, and lay on the party relying on the want of the enrolment, to show that it had not been enrolled. It is like the case of a proviso in an act of parliament, in which it is a settled rule, that the party wishing to avail himself of it, must bring himself within it. As to *the third point, it is clear [*677 that Miss Bingham was not a witness. The case of *Doe v. Wilde*, 5 Taunt. 183, is exactly in point. The rule, therefore, must be discharged.

HOLROYD, J. As to the last point, I am entirely of the same opinion, and shall add nothing to what has fallen from my brother BAYLEY. I am also of opinion, that the deed having been executed by Lassam and his trustees, was complete as to them. The subsequent alteration did not, at all events, revest the term in them. For even the cancelling of a deed does not revest the property conveyed. That appears from the case of *Bolton v. The Bishop of Carlisle*, 2 H. Bl. 263, and the same principle is to be collected from *Roe dem.*

Lord Berkeley v. The Archbishop of York, 6 East, 86. Those cases show that even the destruction of a deed does not revest the rights conveyed by it. Lassam, therefore, and his trustees, by the execution of the deed, extinguished the term ; and the deed, therefore, remains a valid deed as to Bingham. With respect to the other point, I am of opinion, that the onus probandi lies upon the party seeking to avoid the deed, by want of enrolment ; and *Doe v. Mason*, 3 Campb. 7, is an authority in point. The case of a bargain and sale is distinguishable ; for a bargain and sale do not operate at common law, but by statute, if enrolled. It is, therefore, in that case, necessary to prove the enrolment ; for there it is part of the title.

BEST, J. I am of the same opinion. The deed of the mortgagee was in this case complete before the blanks were filled up in the other parts of the deed, and *if the subsequent alteration had the effect contended for by [678] the defendant, this absurdity would follow : that a mortgagee, by an irregularity to which he was no party, and which, in no respect, affected that part of the deed relating to him, would have the legal estate revested in him ; although, if the deed had been altogether cancelled, that effect would not have taken place. There is, however, no such absurdity in the law, and it is not open to the defendant to take this objection, his part of the deed being entire and unsouched subsequently to the time of his execution. I agree also, that there was no necessity for producing evidence of the enrolment. But if it had been necessary, the evidence was sufficient ; for the endorsement by the officer who is authorized to do that act, is, upon general principles, sufficient evidence of the fact of an enrolment. *Kinnersley v. Orpe*, 1 Doug. 56, is an authority upon that point. If the defendant, however, meant to rely upon a defect in the enrolment, it is necessary for him to make out that objection by producing it. Upon the other point, I think the evidence was properly rejected.

ABBOTT, C. J. Not having been in court during the whole of the argument, I have not given any opinion, but I think it right now to say, that I entirely concur in the judgment pronounced by the court, and the reasons on which that judgment is founded. The rule for a new trial must be discharged.

Rule discharged.

Where a note stated that I. S. promised to pay A. B. or order, a certain sum, and was signed I. S. or else I. G.: *Held*, that this was not a promissory note by I. G. within the statute of Anne.

THIS action was brought upon the following instrument. "I, John Corner, promise to pay to Absalom Ferris the sum of 50*l.*, with lawful interest for the same, or his order, at six months' notice. Dated this 24th June, 1808. John Corner, or else Henry Bond." The first count of the declaration treated this instrument as an agreement. The second count, as a promissory note. At the trial, before BURROUGH, J., at the last assizes for the county of Somerset, it was objected, that it had no agreement stamp, and therefore could not be received in evidence as such ; and secondly, that it was not a promissory note within the statute of Anne, as the defendant was only to become liable on the contingency of non-payment by Corner. The learned judge directed the jury to find a verdict for the plaintiff on the second count, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi was accordingly obtained by *Guselee*, in last Easter term, and he cited *Blankenhagen v. Blundell*, 2 B. & A. 417, where it was held, that a note, whereby the maker promised to pay to A. or B. and C. a sum therein specified, value received, was not a promissory note within the statute of Anne. The only distinction between the two was, that there, the payee was uncertain, here, the payer is uncertain.

Pell, Serjt., and *Bayly* now showed cause. This does not differ, substan-

tially, from a several promissory note. *If every one severally promises to pay, it amounts to nothing more, in fact, than a promise by each to pay, if the others do not, for a payment of one discharges all the rest. All, it is true, promise to pay at the same time, but in this instance the defendant promises to pay at six months' notice, and if so, he is to pay at the very same time as Corner, in case Corner make default. The words of this instrument, therefore, carry it no further than the common case, where neither is liable to pay on the day, unless the other does not, and where no action will lie against any one till after the day when either may be sued. This is, therefore, merely a several promissory note, for "else" means nothing more than "or." If, indeed, there be any difference between this instrument and any other several promissory note, it is, that this is, in its terms, more certain; for in a several promissory note, the holder may call on either first; but, according to this note, he is first to call upon Corner. In *Wilkinson v. Lutwidge*, Str. 648, a question arose, whether, under the circumstances, there was an acceptance of the bill by letter, which was in these terms: "The two bills of exchange which you sent me, I will pay, in case the owners of the Queen Anne do not, and they living in Dublin, I must first apply to them. I hope to have an answer in a week or ten days. I do not expect they will pay them, but I judge it proper to take their answer before I do; which I request you will acquaint Mr. Wilkinson with, and that he may rest satisfied of the payment." It was objected, that this did not amount to an acceptance, but only a condition to pay in case the owners of the Queen Anne did not; but it was held to *be a good acceptance, because it amounted to a promise that the plaintiff should have the money at all events.

Per Curiam. This is not a promissory note by this defendant within the statute of Anne. It operates differently as to the two parties. It is an absolute undertaking on the part of Corner to pay, and it is conditional only on the part of the defendant, for he undertakes to pay only in the event of Corner's not paying. The rule for entering a nonsuit must be made absolute.

Rule absolute.

The KING v. The Inhabitants of ST. MARY-LE-BONE.

A pauper does not gain a settlement by having hired a tenement of more than 10*l.* a year value, and having resided therein more than 40 days altogether, but less than 40 days before the passing of the 59 G. 3, c. 50, by which a residence for twelve months is necessary, in order to confer a settlement.

Two justices, by their order, removed Michael Hoyden from the parish of St. Mary-le-Bone, in the county of Middlesex, to the parish of St. Pancras, in the same county. The sessions, on appeal, discharged the order, subject to the opinion of this court upon the following case. The pauper hired an unfurnished shop in the parish of St. Pancras, of the yearly value of 10*l.* and upwards, and lived therein eight months. He afterwards hired an unfurnished shop and parlour, part of a house in the parish of St. Mary-le-Bone, at the rent of 26*l.* a year, which he took possession of on the 25th May, 1819, and resided in and occupied the said last-mentioned premises upwards of 40 days, but only 38 days of such residence and occupancy had elapsed on the 2d day of July, 1819, the day on which the 59 G. 3, c. 50 received the royal assent. The sessions were of opinion, that, by this residence, the pauper gained a settlement in St. Mary-le-Bone, and discharged the order.

Scarlett and Adolphus, in support of the order of sessions. The settlement being in progress to be acquired at the time when the 59 G. 3, c. 50 received the royal assent, must be governed by the law as it existed before the passing of that act. All the words of the act are future, and there is no clause affecting settlements already in progress. The principle is to be found in the case of

Ashburnham v. Bradshaw, 2 At. 36, is in point. There a devise to charitable uses was made, by a will, dated in 1734. The testator lived till July, 1736, a month after the mortmain act had passed, and upon a case, the judges certified that the devise was good; and the *Attorney-General v. Lloyd*, 3 Atk. 551, and *Same v. Andrews*, 1 Ves. sen. 225, are to the same effect. So, in *Gillmore v. Shuter*, 2 Lev. 227, where a parol agreement had been made previously to the statute of frauds, and the action was brought subsequently, it was held not to be within the 4th section; and the court there put the case of a will executed without the formalities required, which they said would be valid, if made before the act, although the testator survived the passing of the act. These cases seem analogous to the present, and show that the whole transaction must be subsequent to the passing of the act. Here, the settlement was in progress at that time.

**Nolan*, contra, contended, that, as the pauper had resided only 38 days at the time of the passing of the 59 G. 3, c. 50, the settlement not being complete under the old law, must be regulated by that act, and then a residence of twelve months upon the tenement is necessary to confer a settlement.

Cur. adv. vult.

- And now (absente Abbott, C. J.,) the judgment of the court was delivered by Bayley, J. The question, in this case, turns entirely upon the construction of the statute 59 G. 3, c. 50, which took effect from the second of July, 1819. The pauper had, on that day, resided in and occupied, for a period of thirty-eight days, part of a dwelling-house in Mary-le-Bone parish, at 26/- a-year; so that, if the statute had not been passed, he would undoubtedly have acquired a settlement in Mary-le-Bone by his subsequent residence and occupation, which, in the whole, considerably exceeded forty days. But he had not, on the second of July, acquired such settlement. It was contended, that the statute being wholly expressed in the future tense did not apply to such a case, but must be considered as wholly and absolutely prospective, and confined to tenements hired after the day on which the statute took effect. If this be the true construction, then a residence of one day prior to the statute, connected with a continued residence in pursuance of the original hiring for thirty-nine days after the date, will confer a settlement. The statute, however, had in view, as appears by the preamble, the preventing of the disputes and controversies which had *arisen respecting the settlement of poor people by the renting of tenements. And we think this object will be best attained by giving to the words of the enacting part their full and absolute effect, and by considering the statute as applicable to every case within its scope, wherein a previous settlement had not been completely gained and established before the statute was passed. A contrary construction might open the door to many disputes and controversies as to the nature and effect of inchoate titles. Whereas, according to the construction which we adopt, the only inquiry hereafter will be, whether a settlement had been acquired before the 2d July, and the case will be considered as if the pauper had died or removed from the tenement on the first day of that month, and as if he had resided *on*, but not *after* that first day of July.

Order of sessions quashed and original order confirmed.

DOE dem. HULL v. GREENHILL.

A trust created by a defendant in favour of himself and another person, is not a trust within 29 Car. 2, c. 3, s. 10, that clause being confined to cases where the trustees are seized or possessed in a trust for a defendant alone, and not jointly with another person.

This was an ejectment, tried before Abbott, C. J., at the Middlesex sittings after last Michaelmas term, when a verdict was found for the lessor of the plaintiff, who claimed under a judgment recovered against the defendant, and a writ of ejectment and inquisition thereon, taken and returned; but liberty was reserved

to the defendant to move to enter a nonsuit, upon an objection taken at the trial. The objection was, that by a deed, executed 23d June, 1809, long before the plaintiff's judgment was recovered, the legal estate *in the premises [*685 was vested in trustees, for the purpose of securing an annuity to the defendant's mother. (a) By the deed, the trustees were empowered to enter, in case the annuity was in arrear; which they did in 1817. But, at the time of the execution of the elegit, and of commencing the present action, there was nothing in arrear. It was contended, for the plaintiffs, that the case fell within the 29 Car. 2, c. 3, s. 10, as being premises held in trust for the defendant. A rule nisi having been obtained by *Scarlett*, in last Hilary term, for entering a nonsuit,

Marryat and *Archbold* now showed cause. By the 29 Car. 2, c. 3, s. 10, it is enacted, "That it shall be lawful for every sheriff, to whom any writ shall be directed, at the suit of any person, upon any judgment, statute, or recognisance, to deliver execution of all such lands, tenements, rectories, &c., as any other person be in any manner or wise seized or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution is sued, has been seized of such lands, &c., of such estate, as they be seized of in trust for him at the time of the execution sued." Now here the term is held by the trustee, for the purpose of securing Mrs. Greenhill's annuity, and he is to be at liberty to enter and take possession, from time to time, as arrears may arise, but subject to this, the premises are held in trust for Greenhill, the defendant. Suppose the defendant had desired to be put into possession, *the trustees [*686 could not have refused to do it, the annuity not being in arrear. And if they had refused, he might have brought an ejectment against them. Here the inquisition finds that the property is subject to the annuity, which the judgment creditor does not seek to disturb. Under the statute, the term, being vested in the trustees in trust for the defendant, may be taken under the elegit, and it is only so far as it is in trust for the defendant, that the judgment creditor is entitled to it. For if the annuity be in arrear, the trustees may again eject the creditor. The effect of the statute is, to remove the term out of the way of the lessor of the plaintiff, which otherwise would prevent him from recovering. The statute expressly states, that a trust may be taken under an execution. Now it may be either a trust created by a third person in favour of the defendant, or one created by the defendant himself, either in his own favour, or in favour of himself and some other person jointly. The test as to the first class is this: divest the case of the trust, and consider it as a legal estate, and if in that case it would be extendible, it will be, when a trust estate, within the statute. Now, if here it had been a conveyance by a third person to Mrs. Greenhill and the defendant, of a legal estate, either as tenants in common, or joint-tenants, the interest of the defendant would be extendible. If so, a trust of that sort would be within the statute. As to the second class, a conveyance to others in trust for the person conveying alone, was always void, as being a voluntary conveyance, and so could not require the assistance of the statute to render it capable of being taken under an elegit. That, however, could not be the trust contemplated by Lord *HALE*, the framer of the statute of *frauds. He must, therefore, have contemplated a trust, if created by a defendant himself, not solely in favour of himself, but of himself jointly with some other person, which is the trust in this case. This, therefore, is a case falling within the statute.

Scarlett and *Hutchinson*, contra, contended, that supposing the argument correct, as urged on the other side, that a trust created by a man in his own favour was altogether void, then it followed, that in this case the trust, as to the defendant, was void; and then the premises, in point of law, were held in trust;

(a) The trusts of the deed are so fully stated in the judgment, that they are here omitted.

for Mrs. Greenhill alone. But if not, then the true construction of the statute was to confine it to cases of trusts held solely for the benefit of the defendant, which this was not.

Cur. adv. vult.

And now, on this day, the judgment of the court was delivered by

ABBOTT, C. J. We have considered of this case, and are of opinion, that the rule must be made absolute. The ejectment was brought on a judgment recovered by the lessor of the plaintiff against the defendant, and a writ of egleit and inquisition thereon taken and returned. It was brought for the recovery of a moiety of some chambers in Lincoln's Inn. Mr. Greenhill defended as landlord. The question at the trial, and afterwards before the court, arose upon the effect of a deed executed by the defendant and his mother, Mrs. Greenhill, some considerable time before the plaintiff's judgment against him, for the purpose of securing to her an annuity for *her life, to be issuing out of the premises in question, *inter alia*, in lieu of her dower. The deed recited, that James Greenhill was, at the time of his decease, seised in fee-simple in possession of the freehold chambers, the subject of this action, and of other freehold and copyhold property ; the whole of which property was liable to the right of dower and free bench of Mary Greenhill, his widow ; and that, on the decease of James Greenhill, the whole of the said estates became vested in the defendant, Edward Greenhill, his son and heir at law, subject to the said right of dower ; and that it had been agreed between the defendant and Mary Greenhill, that the defendant should secure to her an annuity or rent charge of 88*l.* during her life, to be payable out of the said chambers ; and that, in consideration thereof, Mary Greenhill should release her right to dower and free bench in all the freehold and copyhold hereditaments. The deed then proceeded to state, that Edward Greenhill and Mary Greenhill bargained and sold, &c. unto P. B. Coates, the chambers, with their appurtenances, habendum to him, to the use, intent, and purpose, that Mary Greenhill might, during her life, receive one annual rent-charge or yearly sum of 88*l.*, which was to be in full satisfaction of her right to dower or free bench, with power of distress, &c., to the use of Coates, for 99 years, without impeachment of waste, and upon the trusts therein mentioned ; and from and after the end and expiration, or sooner determination of the term of 99 years, to the use of Edward Greenhill, his heirs and assigns for ever, and as to the term of 99 years, upon the following trusts : first, to permit Edward Greenhill to receive and take the rents and profits, until default made in the payment of the rent-charge, or until *E. Greenhill should neglect to insure the premises, and upon further trust, that in case the rent-charge should be in arrear for the space of 40 days, that it should be lawful for Coates to enter upon the said chambers, and to receive the rents thereof, and out of the same, or by mortgage or sale of the chambers, &c., for all or any part of the said term of 99 years ; or by bringing actions against the tenants of the premises, for the recovery of rents in arrear, or by making entry upon the premises, to levy, raise, and pay all such arrears of the rent-charge, with all costs, &c.; and upon further trust, that in case the defendant should at any time neglect to insure the premises, it should be lawful for Coates to levy money sufficient to pay the premium to insure the premises, and to apply the same accordingly ; and to permit the said E. Greenhill, as to the residue, to receive the rents and profits. There then followed a proviso, that, upon the death of Mary Greenhill, and payment of the arrears of the rent-charge, the term should cease and determine. The personal representative of Coates, the termor, had recovered the premises by ejectment some time ago, the annuity being then in arrear : the arrears had been discharged, and the annuity afterwards kept down, Mrs. G. receiving money for the latter purpose, from time to time, from the tenants of the premises ; and nothing was due to her at the time of the execution of the egleit, or of the commencement of the present action. For the plaintiff, it was contended, that, under these circumstances, the term must be considered

as a trust for the defendant, within the operation of the tenth section of the statute of frauds, and that the premises were liable to the execution by elegit, under the provisions of that statute, and might, after such execution, *be recovered by ejectment. For the defendant, it was insisted, that the term was a bar to the ejectment: that this was not a trust within that statute; and, supposing it to be, and that the premises might be subject to the elegit, yet that the possession thereof could not be recovered by ejectment out of the hands of the trustee, who had the legal title for the term. It is unnecessary to give any opinion upon the latter point; because we are all of opinion, that this case does not present a trust within the intent and meaning of the statute. The words of the statute are, "seised or possessed, in trust for him against whom execution is sued, like as the sheriff might and ought to do, if that person were seized." This statute made a change in the common law, and, up to a certain extent at least, made a trust the subject of inquiry and cognisance in a legal proceeding. We think the trust that is to be thus treated, must be a clear and simple trust, for the benefit of the debtor; the object of the statute appearing to us to be, merely to remove the technical objection arising from the interest in land being legally vested in another person, where it is so vested for the benefit of the debtor. It is obvious, that the term of years, in the present case, was not created for the benefit of Mr. Greenhill, the debtor, but for the benefit and security of his mother, Mrs. Greenhill; she is the principal object of the trust. And, though it be true that the term is declared to be in trust for him, until default be made in the payment of the annuity, yet such a default had, in fact, occurred, whereby, according to the declaration of trust contained in the deed, the trust for him had ceased for a time at least; and possession had been actually recovered, by a proceeding at law, for *the benefit of his mother. [*691 who had continued to receive the annuity from the tenants in virtue of that recovery; so that the case is more adverse to the lessor of the plaintiff than it might have been, if no default had been made by the defendant, nor recovery had against him, for the benefit of his mother. And it would be quite an anomaly in the law to allow one person to recover a possession of land, liable to be defeated and divested at the suit of another, claiming under a title created before the time of such recovery, and actually existing, and shown to the court at that very time. We abstain from saying any thing as to any other remedy that the lessor of the plaintiff may be supposed to have in the present case. It is sufficient for us, and for the purpose of the present cause, to say, that, in our opinion, under the facts proved at the trial, the term was not held in trust for the defendant, within the meaning and intent of the statute of frauds. The present rule, therefore, must be made absolute, and the postea be delivered to the defendant.

Rule absolute.

JACKSON v. DAVISON.

An insolvent debtor having petitioned the insolvent court to be discharged under the act, a creditor gave notice of his intention to oppose him, on the ground that the debt was fraudulently contracted. To induce the latter to withdraw his opposition, the insolvent agreed to execute, within three days after his discharge, a warrant of attorney for the debt, and, in the mean time, to give a promissory note of a third person for the amount, which was to be delivered up on the execution of the warrant of attorney. The insolvent was discharged, and the warrant of attorney was executed on the delivery up of the note. The court set aside the warrant of attorney, and the judgment entered up thereon, on the ground that the agreement on which they were founded was contrary to the policy of the insolvent act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects, which the legislature intended to be distributed amongst all the creditors.

A RULE nisi had been obtained for setting aside the warrant of attorney, and the judgment entered up thereon in this case, and for discharging the defendant *out of the custody of the marshal. It appeared upon the affidavits, [*692 that the defendant, in November, 1820, was discharged under the insol-

vent act, the 1 Geo. 4, c. 119. The plaintiff, on that occasion, was an opposing creditor for a debt of 1200*l.*, which was principally for money lent, for the purpose of enabling the defendant to remove an execution out of his dwelling-house, and as a security, he gave the plaintiff a bill of sale of all his household goods. Notwithstanding this, the defendant fraudulently removed his goods from the premises under a collusive execution. On these grounds the plaintiff gave notice of his intention to oppose the defendant's discharge. In order to induce the plaintiff to withdraw the opposition, the defendant agreed to secure the debt by a warrant of attorney, to be executed within three days after the defendant's discharge, and in the mean time, by a promissory note of a friend, payable on demand, the plaintiff undertaking to deliver up such notes, on the defendant's executing the warrant of attorney. In pursuance of such agreement, the note was given and cancelled on the execution of the warrant of attorney, and the first instalment having become due, the plaintiff had entered up judgment and sued out execution.

Scarlett and Pollock now showed cause. The plaintiff in this case might, by opposing the defendant's discharge, have caused him to suffer two years' imprisonment, under 1 Geo. 4, c. 119, sec. 18. That provision was introduced for the benefit of the creditor, and it is competent to a man to renounce a provision of an act of parliament which is in his own favour. Here the warrant of attorney was not given until after the defendant's discharge; it therefore created a new debt. [BAYLEY, J. "Was it not a debt "occasioned" before the discharge?"] Here the debt on the warrant of attorney was occasioned not by the first debt, but by the promissory note which the plaintiff delivered up to be cancelled. The object of the act was, to protect those who were creditors before the discharge of the insolvent. Persons becoming creditors subsequently to the discharge, were not within the contemplation of the legislature. [BAYLEY, J. Does not this warrant of attorney injure the rights of the other creditors, as to their claim upon the future effects of the insolvent?] The difficulty of obtaining the future effects of the insolvent by the provisions of the act is such, that they can scarcely be said to have their rights affected; though it must be confessed, that the payment of the debt under this warrant of attorney must be provided for, before any part of the future effects could be divided among the other creditors specified in the defendant's schedule. This however, is not an application on the part of any of the other creditors, whose rights might, by possibility, be affected by it, but of the defendant himself, who having, for his own benefit, and to avoid a severe judgment by the court before whom he sought to be discharged, entered into a subsequent security, seeks to get rid of it, now that his creditor is without remedy against him, under the provisions of the insolvent act. The effect of a judgment of imprisonment against him, under the 18th section of the act, would have been to drive him to procure his liberty, by application to friends to enable him to discharge the debt due to the plaintiff, which would require him to contract debts to those friends, which it could not be contended would not be legitimately contracted. [BAYLEY, J. so as to entitle them to be provided for out of the future effects, as debts contracted subsequently to the discharge, in preference to the debts in the schedule. The arrangement now sought to be set aside, has merely effected the same object by a less circuitous mode. The court, therefore, will be very unwilling to relieve the defendant in this case, upon the plea that the security which he has given to the plaintiff is contrary to the policy of the insolvent act.]

Gurney and Abraham, contra. It is contrary to the policy of the insolvent debtor's act, that this warrant of attorney should be permitted to operate as a valid security. The object of the legislature was, that the person of the debtor should be free, as to all debts contracted, incurred, or occasioned before his discharge, and that his property, acquired after his discharge, should be distributed

among all his creditors. Now the debt due upon this warrant of attorney, was one occasioned, at least, before the discharge, within the meaning of that word in the 8th section. If it be permitted to stand, the plaintiff will thereby take a portion of the future property of the debtor, to the prejudice of the general creditors; or he may even take out execution against the person of the debtor. On the other hand, if the debtor has fraudulently contracted debts, fair dealing to the public requires that he should be opposed on that ground, and he might then have been subjected to further imprisonment, under section 18. In *Wilson v. Kemp*, 3 M. & S. 595, it was held, that an insolvent debtor, who had taken the benefit of the insolvent act then in force, was not liable to arrest, upon a subsequent promise to pay a debt contracted prior to the day prescribed in the act. The words in that act were, that no person shall *hereafter be imprisoned, by reason of any debt contracted, incurred, occasioned, [*695 owing, or growing due, before, &c. That case is expressly in point; for in this case, the old debt was the only consideration for the warrant of attorney.

BAYLEY, J. I am of opinion that the rule for setting aside this warrant of attorney and judgment ought to be made absolute. It is part of the policy of the insolvent debtors' act, that the property of the debtor shall be divided ratably amongst his creditors. Now, if this warrant of attorney were to stand as a valid security, it might operate in fraud of the general body of creditors, by enabling the present plaintiff to take from them a large portion of the future effects of the debtors, which the legislature manifestly intended to be distributed among all the creditors. Now, it has been held in the case of a composition deed, that if one of the creditors, before executing the deed, obtain from the insolvent a security for the residue of his demand, by refusing to execute until such security be given, that security is void in law, because it is a fraud upon the rest of the creditors.(a) So, too, by the express provisions of the bankrupt laws, any security given to a creditor as a consideration to persuade him to sign a certificate, is void. Now, it was manifestly the intention of the legislature, by this act of parliament, to secure a portion of the future effects of the debtors for the benefit of those creditors whose names are inserted in the schedule. By section 25, the insolvent court is authorized to order judgment to be entered up against the debtor for the amount of the debts for which he *shall be discharged; and when the prisoner is of ability to pay such [*696 debts, or any part, the court may then permit execution against the property acquired by such prisoner after his discharge, for such sum as, under all the circumstances of such prisoner, the court shall order; the sum levied is to be distributed ratably among the creditors. This warrant of attorney, if supported, would interfere materially with the policy of the act, by taking from the body of the creditors a portion of those funds which the legislature meant to be distributed among all, and by defeating the effect of the judgment entered up by order of the insolvent court. It was given in pursuance of an agreement between the parties made before the discharge of the prisoner, and for the express purpose of defeating the object of the act. I think, therefore, that it ought not to stand as a valid security. This rule, therefore, must be made absolute.

HOLROYD, J. I am of the same opinion. This warrant of attorney was founded upon an agreement which is in direct opposition to the policy of this act of parliament. The object of the act was, that the person of the debtor should be free, with respect to all those debts from which he had been discharged; and that his future effects only should be liable in the mode there pointed out. Now, if this warrant of attorney were to stand as a valid security, the present plaintiff would be entitled to have execution for a debt which

(a) See *Cockshott v. Bennett*, 2 T. R. 763; *Jackson v. Lomas*, 4 T. R. 166; *Jackson v. Du-Aire*, 3 T. R. 551; *Leicester v. Rose*, 4 East, 372; [Yelv. 11 a, (Metcalfe's ed.) 9 Johns. Rep. 333.]

existed before the debtor's discharge, without any application to the insolvent court ; for his judgment would not be under the control of that court. He would, by these means, be enabled either to take from the rest of the creditors the property subsequently acquired, or, if there was no property, he might even [697] take the person of the debtor in execution, "which is directly in the teeth of the act of parliament. I think, therefore, that this warrant of attorney must be made absolute.

BEST, J. I am of the same opinion. This warrant of attorney operates in fraud of the general body of creditors. It has been held, that where creditors enter into a composition deed, and one of them take a security for a larger sum than that stipulated to be paid by the deed, that such security is void ; because the temptation to give the security is a fraud on the creditors who were parties to the contract on which their debts were to be cancelled in consideration of receiving a composition. Now, in that case, the creditors are not prejudiced in the same degree as they are in this ; because here the future effects of the insolvent are, by the provisions of this act, directed to be divided ratably among the creditors until their debts are wholly paid. By enforcing such a security, we should enable the plaintiff to deprive his co-creditors of some portion of that fund which the legislature intended to be ratably distributed among all. This rule must therefore be made absolute.

Rule absolute.(a)

(a) Abbott, C. J., was absent at the privy council.

BURT v. WALKER.

The clerk of the defendant was the subscribing witness to a bond, and when he was subpoenaed, said that he would not attend ; and the trial had been put off twice in consequence of his absence. Search had also been made at the defendant's house, and in the neighbourhood ; and upon receiving information at the defendant's that the witness was gone to Margate, inquiry was there made without success. Held, that under these circumstances, evidence of his handwriting was admissible.

THIS was an action upon a bail bond, brought in Easter term last. Plea, non est factum. The bond was witnessed by one Smith, a clerk of the defendant, *698] *who had been subpoenaed at the defendant's counting-house, and at the time of serving the subpoena, said he should not attend. Evidence, however, was given, that he did attend when the cause stood in the paper for trial the first time, which was six weeks before the actual trial. The trial had been before twice put off on account of Smith's absence, upon affidavits that he could not be found. Search was then made for him at the defendant's house, and in the neighbourhood ; and it was likewise proved, that, upon receiving information at the defendant's house, that he was gone to Margate upon his master's business, the clerk of the plaintiff's attorney was sent thither to search for him. The affidavits stated, that he had been searched for up to the moment of trial, and could not be found. The cause was tried at the last sitting in this term before HOLROYD, J., who admitted evidence of his handwriting, but reserved the point.

Holt moved for a rule to show cause, why there should not be a new trial in this case, on the ground that secondary evidence of the execution of the bond by the defendant had been improperly admitted. Here the witness had been subpoenaed, and actually attended only six weeks previous to the trial. Besides, the witness was in the condition of a travelling clerk to a mercantile house, and, with reference to such condition, the search had not been sufficient to justify the admission of secondary evidence. It is to be observed that none of the previous cases have gone so far as the present. In none had the witness been subpoenaed and attended, and at so short a time previous to the actual trial. His ab-

sence under such circumstances might be good ground for putting off the trial, but not for admitting secondary evidence. The principle of all the cases seems to be this: that the evidence offered, that the witness could not be found, should be sufficient to justify the reasonable inference, either that he was kept out of the way by collusion, or that he was absent under circumstances which precluded any reasonable expectation that he would be forthcoming at the trial. But neither of these inferences was justified by the evidence in the present case. Besides, the sufficient and reasonable search must always have reference to the circumstances and condition of the witness. Suppose a witness to be a traveller to a mercantile house. The same search would not be sufficient for a witness of this description, as for a witness having a fixed residence. He cited *Wardell v. Fermor*, 2 Campb. 282; *Parker v. Hoskins*, 2 Taunt. 223; *Cunliff v. Sefton*, 2 East, 183.

ABBOTT, C. J. I remember the case well, and there was strong ground for believing the witness was kept out of the way, purposely, by the defendant. It appears, that upon receiving the subpœnas, the witness said he would not attend. I do not believe that he did attend with any view of exhibiting himself as a witness. I think that due and diligent search was made for him, and that the search was made with reference to his condition. The case of *Crosby v. Percy*, 1 Taunt. 365, is as strong as the present. Upon the ground of collusion, and not believing that the postponement of the trial would have assisted the plaintiff in obtaining the attendance of this witness, I think that the evidence of his handwriting was properly admitted.

BAYLEY, J. The search must certainly be made with reference to the condition of the witness. I think that it has been so made in the present case. The clerk was referred to Margate, and went thither.

BEST, J. The circumstance of the witness being subpœnaed would have been a strong feature, if the court could believe that the witness actually attended according to the subpœna, but we do not believe this.

Rule refused.

HOLROYD v. BREARE.

In this case, reported ante, p. 43, the facts should have been thus stated: It was an action of trespass against the two defendants for taking the plaintiff's goods. They pleaded, first, the general issue; and, secondly, separate justifications, under a judgment and execution against the goods of a third person. At the trial, a verdict was found for both defendants, on their pleas of justification as to the major part of the goods; but it turned out that there were some goods taken, the property of the plaintiff, and a verdict was consequently found against them as to those goods, upon the general issue. A motion was afterwards made (see ante, vol. ii. p. 473;) and the court then ordered a verdict to be entered for the defendant Breare generally; but as to the other defendant, Holmes, it was left undisturbed.

END OF TRINITY TERM.

AN
INDEX
TO THE
PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

Gillaspie

The figures refer to the English folios, which will be found in a bracket at the head of the page, and in the margin of the text

ABATEMENT.

Defendant having pleaded in abatement, that four others were jointly liable with himself, the plaintiff applied to the defendant's attorney to give the places of residence and additions of those persons, which he refused, unless the action were discontinued. Under these circumstances, the court made a rule absolute for the defendant to deliver such particulars, or in default thereof, for setting aside the plea. *Taylor and Others v. Harris*, M. 1 G. 4. 93

ACTION ON THE CASE.

1. A carrier had given notice that he would not be answerable for parcels of value, unless entered and paid for as such; and the plaintiffs, with the knowledge of this, delivered a parcel, containing bank notes to a large amount, without informing the carrier of its contents. The coach in which the parcel was conveyed, was left at midnight, standing for some time in the middle of a very wide street, with a porter, who was ordered to watch it; during this time the parcel was stolen. At the trial, two questions having been left to the jury, first, whether the plaintiffs had been guilty of any unfair concealment, by not informing the carrier of the nature and value of the parcel; and, secondly, whether the carrier had been guilty of gross negligence: *Held*, by three judges (Bast, J., dissentiente) that the direction to the jury was right. *Batson v. Donovan*, M. 1 G. 4. 21

2. Where an attorney for the plaintiff suffered the case to be called on without previously ascertaining whether a material witness, whom the plaintiff had undertaken to bring into court had arrived, in consequence of which the plaintiff was nonsuited: *Held*, that in an action against him for negligence, it was pro-

perly left to the jury to say, whether he had used reasonable care in conducting the cause; and the jury having found in the negative, the court refused to disturb the verdict. *Reece v. Righy*, H. 1 and 2 G. 4. 202

3. Where lights had been enjoyed for more than 20 years, contiguous to land which, within that period had been glebe land, but was conveyed to a purchaser, under the 55 G. 3, c. 147, it was held that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed. *Barker v. Richardson*, T. 2 G. 4. 579

AGREEMENT.

See FRAUDS, STATUTE OF.

ALE.

See APPEAL, 3.

ALIEN ENEMY.

See INSURANCE, 2.

ANCHOR.

See PATENT.

ANNUITY.

1. By letters patent, 24 Car. 2, the king granted to the use of A, his heirs and assigns for ever, an annuity of 1000*l.* to be paid out of his revenue of four and a half per cent, at Barbadoes and the Leeward islands: *Held*, that this annuity was personal property, and duly passed under a will attested by two witnesses, by a residuary clause bequeathing all the rest, residue, and remainder of a testatrix's personal estate of what nature or kind soever, to her executors. *Aubin v. Daly*, M. 1 G. 4. 59

2. Where part of the consideration money for an annuity had been deposited in the

hands of the grantee's attorney, till certain houses, out of which the annuity was granted, should be completed; but it appeared that the money deposited had all been paid over to the grantee in a short time after the date of the deeds, and there was no fraud in the transaction, the court refused to set aside the annuity, on the ground that the power given to them by the 53 G. 3, c. 141, s. 6, was discretionary, and that this was not the case of a fraudulent retainer contemplated by the act:

Held, also, that in the memorial of an annuity, under 53 G. 3, c. 141, it is sufficient to state that the annuity was granted for the lives of A. B., &c. (naming them,) without stating their description by residence or otherwise, or adding that the annuity was granted for their joint lives or the life of the survivor, or for a term of years determinable on those lives:

Held, also, that in the memorial of a warrant of attorney to confess judgment, as a collateral security for an annuity, it is not necessary to state for what penal sum it authorizes a confession of judgment. *Barber v. Gameon*, H. 1 and 2 G. 4. 281

APPEAL.

1. By 50 G. 3, c. 48, s. 25, it is provided, that any party aggrieved by the conviction under that act, who shall enter into a recognisance to appear at the next sessions, shall be at liberty to appeal to such sessions: *Held*, that this dispenses with the necessity of any notice of appeal; and that, if the party duly enter into the recognisance, the sessions are bound to hear the appeal. *The King v. The Justices of Essex*, H. 1 and 2 G. 4. 276
2. Where by charter the magistrates of a borough, which was a county of itself, held only general sessions twice a year, and not quarter sessions: *Held*, that an appeal against an order of removal might be made to the next general sessions of the peace for such borough. *The King v. The Justices of Carmarthen*, H. 1 and 2 G. 4. 291
3. No appeal lies to the sessions from a conviction for selling ale without an excise license, under 48 G. 3, c. 143, s. 5. *The King v. Joseph Hanson*, E. 2 G. 4. 519

APPEAL, NOTICE OF.

Sembly, that the entering into the recognisance required by 49 G. 3, c. 68, s. 5, before the justices, who make an order of bastardy, does not dispense with the necessity of giving such justices notice of appeal against the order, the statute requiring the party to give notice of bringing such appeal, "and of the cause and matter

thereof." But held, that a parol notice of such appeal, and of the cause and matter thereof, will be sufficient. *The King v. The Justices of Salop*, T. 2 G. 4. 626

APPRENTICE.

An apprentice, bound for seven years to A., served him in his house between five and six years, and afterwards, for the remainder of the term, resided in his mother's house, having agreed with his master that he should be at liberty to work for whom he pleased, he paying 2s. per week to his master. The master also, during this time, occasionally gave him work, for which he was not paid: *Held*, that this was not a continuance of the service to A. for seven years under the indenture. *The King v. Inman*, M. 1 G. 4. 55

ARBITREMENT.

Where a case was referred by order of nisi prius, and after the reference, but before the making of the award, the plaintiff became bankrupt: *Held*, that this was no revocation of the submission, and that the arbitrator having awarded a verdict for the defendant, had done right. *Andrew v. Palmer*, H. 1 and 2 G. 4. 250

ARREST.

See PRACTICE, 20.

ASSUMPSIT.

See PLAIDING, 3.

1. Where a return cargo belonging to plaintiff had been consigned by the defendant to B. and W., *to be held at the orders of defendant*, who had a lien on it, and such cargo had been sold by B. and W., and the lien satisfied: *Held*, that the plaintiff could not consider B. and W. as defendant's agents, so as to entitle him to maintain money had and received against the defendant, for the balance remaining in the hands of B. and W. *Tennant v. Mackintosh*, T. 2 G. 4. 594
2. Declaration stated, that plaintiff had cohabited with defendant as his mistress, and that it was agreed that no further immoral connexion should take place between them, and that defendant should allow her an annuity, so long as she should continue of good and virtuous life and demeanor; and thereupon, in consideration of the premises, and that plaintiff would give up the annuity, defendant promised to give her as much as the annuity is worth: *Held*, bad upon general demurrer. *Bennington v. Wallis*, T. 2 G. 4. 650

ATTORNEY.

See PRACTICE, 1, 2, 3.

1. Where an attorney for the plaintiff suffered the case to be called on without

previously ascertaining whether a material witness, whom the plaintiff had undertaken to bring into court, had arrived, in consequence of which the plaintiff was nonsuited: *Held*, that in an action against him for negligence, it was properly left to the jury to say, whether he had used reasonable care in conducting the cause; and the jury having found in the negative, the court refused to disturb the verdict. *Reeve v. Righy*, H. 1 and 2 G. 4. 202

2. The plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record: *Held*, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied. *Marr v. Smith*, E. 2 G. 4. 466

AUCTIONEER.

See HAWKER AND PEDLER, 1, 2.

AWARD.

See RULES OR COURT.

Where a case was referred by order of nisi prius, and after the reference, but before the making of the award, the plaintiff became bankrupt: *Held*, that this was no revocation of the submission, and that the arbitrator having awarded a verdict for the defendant, had done right. *Andrews v. Palmer*, H. 1 and 2 G. 4. 250

BAIL.

1. The bail to the sheriff are discharged by the defendant's giving a cognovit for payment of debt and costs. *Farmer v. Threlkell*, M. 1 G. 4. 91

2. The proceedings in an action on the bail bond having been stayed, the defendant pleaded to the original action, the general issue, and subsequently a plea of bankruptcy, *puis darrein continuance*. There being no affidavit, that the application to stay the proceedings was made on the part of the bail, the court now set aside the latter plea, and restrained the defendant to his plea of general issue, on the ground, that when the proceedings were stayed in the action on the bond bail, it was intended, that the defendant should only question the validity of the original debt. *Dowson v. Levi*, H. 1 and 2 G. 4. 249

3. Bail above are not sureties, or persons liable for the debt of a bankrupt, within 49 G. 3, c. 121, s. 8. *Newington v. Keays*, E. 2 G. 4. 493

BANKRUPT.

1. Where A. having drawn a bill of exchange for 148*l.* in favour of B., to whom he was previously indebted in that amount, committed an act of bankruptcy

before either the bill was due, or had been presented for acceptance: *Held*, that such bill of exchange was a good petitioning creditor's debt, although it appeared, that subsequently to the commission, the bill had been duly presented and paid by the acceptors. *Ex parte Douthat*, M. 1 G. 4. 67

2. A creditor of an insolvent trader, may, after the debtor's discharge under the 53 G. 3, c. 102, take out a commission of bankruptcy against him; and his debt, although included in the insolvent schedule, will be a sufficient petitioning creditor's debt at law to support the commission. *Jellie, assignee of Routledge, v Mountford*, H. 1 and 2 G. 4. 256

3. In assumpsit by the provisional assignee of a bankrupt, defendant pleaded the general issue: *Held*, that the fact of the bankrupt's estate having been assigned by the provisional assignee to the new assignees, between the time of issuing the latitat and the delivery of the declaration, is no ground of nonsuit upon a plea of non assumpsit. *Quere*, Whether it would have been an answer to the action, if specially pleaded? *Page, Assignee v. Bauer*, E. 2 G. 4. 345

4. A bankrupt, on the day appointed for his last examination before the commissioners, promises to produce a balance sheet, if further time be given. Several adjournments take place, during a period of ten months, at which adjournments he represents an account in writing to be necessary, in order to make the discovery required of his estate and effects; and he promises from time to time to produce the balance sheet. That not being produced at the last adjournment, and no sufficient reason being given by him for not producing it, it was held, that the commissioners were justified in committing him. *Davie v. Milford and Others*, E. 2 G. 4. 356

Semblable, That by the 5 G. 2, c. 30, & 1, the bankrupt is bound to render to the commissioners, if required, an account in writing of his estate and effects. *Ibid.*

5. A fraudulent conveyance made voluntarily by a trader, in order to give a preference to particular persons to the prejudice of his general creditors, is an act of bankruptcy, although the bankrupt subsequently continued to carry on his trade for three years, at the end of which time a commission issued. *Pulling v. Tucker*, E. 2 G. 4. 383

6. A person living in the Isle of Man, coming from time to time to England, and buying goods which were afterwards sold in the Isle, is a trader against whom a commission of bankruptcy may issue in England, although he in fact never sold any goods in England. *Allen v. Cannon*, E. T. 2 G. 4. 418

7. Bail above are not sureties, or persons liable for the debt of a bankrupt, within 49 G. 3, c. 121, s. 8. *Newington v. Keays*, E. 2 G. 4. 493
8. The issuing a commission of bankruptcy is not of itself sufficient notice to all the world of a prior act of bankruptcy having been committed; and, therefore, if a payment be made of a debt to a bankrupt after the issuing of such commission, but before the party paying has any actual knowledge of the bankruptcy, such payment will be protected within 1 Jac. 1, c. 15, s. 14. *Sowerby v. Brooks*, E. 2 G. 4. 523
9. A bill of exchange drawn by defendant in Ireland, and accepted and paid by plaintiff in England, is a debt contracted in England, and cannot therefore be discharged by a certificate under an Irish commission of bankruptcy. *Lewis v. Owen*, T. 2 G. 4. 655
- BARON AND FEME.**
See Practice, 17.
- Where a husband, not separated from his wife, makes an allowance to her for the supply of herself and family with necessaries during his temporary absence, and a tradesman, with notice of this, supplies her with goods, the husband is not liable for the debt. *Holl v. Brien*, H. 1 and 2 G. 4. 252
- BILL OF EXCHANGE.**
See Promissory Note.
1. Where A. having drawn a bill of exchange for 148*l.* in favour of B., to whom he was previously indebted in that amount, committed an act of bankruptcy before either the bill was due or had been presented for acceptance: *Held*, that such bill of exchange was a good petitioning creditor's debt, although it appeared that, subsequently to the commission, the bill had been duly presented and paid by the acceptors. *Ex parte Douthat*, M. 1 G. 4. 67
2. A bill of exchange having been accepted generally, the drawer, without the consent of the acceptor, added the words "payable at Mr. B.'s, Chiswell street." *Held*, that this was a material alteration, and that the acceptor was thereby discharged. *Cowie and Another v. Halsall*, H. 1 and 2 G. 4. 197
3. When the acceptor of a bill of exchange, having made it payable at Messrs. C. and Co's., has not sufficient effects in their hands at the time when the bill becomes due, he is not entitled to notice of its dishonour: *Quare*, whether in case of such an acceptance, any notice be, under any circumstances necessary. *Smith v. Thatcher*, H. 1 and 2 G. 4. 200
4. In an action against the drawer of a bill payable at a particular place, it is no defence that no notice of the dishonour has been given to the acceptor: nor is it any defence that the bill was accepted for a gaming debt, if it be endorsed over by the drawer for a valuable consideration, to a third person, by whom the action is brought. *Edwards v. Dick*, H. 1 and 2 G. 4. 213
5. In an action against the acceptor of a bill payable at a banker's, it is not necessary to prove notice of non-payment to the acceptor. *Treacher v. Hinton*, E. 2 G. 4. 413
6. The endorser of a bill of exchange which had been dishonoured, and which a subsequent endorser had made his own by laches, paid the bill, and immediately gave notice of dishonour to the defendant, a prior endorser: *Held*, that the plaintiff could not recover the amount, although it appeared, that the defendant, in case successive notices had been given by all the parties on the bill, could not have received notice of dishonour at an earlier period. *Turner v. Leech*, E. 2 G. 4. 451
7. A bill of exchange drawn by defendant in Ireland, and accepted and paid by plaintiffs in England, is a debt contracted in England, and cannot, therefore, be discharged by a certificate under an Irish commission of bankruptcy. *Lewis v. Owen*, T. 2 Geo. 4. 654
- BRIDGE.**
The Court of Quarter Sessions cannot impose more than one fine for the non repair of a bridge. *The King v. The Inhabitants of Machynlleth*, E. 2 G. 4. 469
- BROKER.**
See Insurance Broker, 1.
- BY-LAW.**
See Corporation.
-
- CANAL ACT, CONSTRUCTION OF.**
An act of parliament provided, that the M. Canal Company should not take any higher or greater rate of tonnage than should, for the time being, be taken by the B. Canal Company; and the latter, by a resolution at a general assembly, and under their common seal, reduced their tolls: *Held*, that the M. Canal Company could not question collaterally the validity of such resolution, but were bound by it. The B. Canal Company's act directed, that no reduction of the tolls should take place, unless assented to by two-thirds of the proprietors; but allowed them to vote by proxy, a form for which instrument was given by the act. *Quare*, Whether such instrument requires to be stamped. *The Monmouthshire Canal Company v. Kendal*, E. 2 G. 4. 653

CARRIER.

A carrier had given notice that he would not be answerable for parcels of value, unless entered and paid for as such; and the plaintiffs, with the knowledge of this, delivered a parcel, containing bank notes to a large amount, without informing the carrier of its contents. The coach in which the parcel was conveyed, was left at midnight, standing for some time in the middle of a very wide street, with a porter, who was ordered to watch it; during this time the parcel was stolen. At the trial, two questions having been left to the jury, first, whether the plaintiffs had been guilty of any unfair concealment, by not informing the carrier of the nature and value of the parcel; and, secondly, whether the carrier had been guilty of gross negligence: *Held*, by three judges (Best, J., dissentiente) that the direction to the jury was right. *Batson v. Donovan*, M. 1 G. 4. 21

CERTIORARI.

The notice required by 13 G. 2, c. 18, s. 5, for removing an order of justices by certiorari, must state on the face of it the name of the party applying for the writ. *The King v. The Justices of Lancashire*, H. 1 and 2 G. 4. 289

CHALLENGE.

See JURY.

COMMISSION TO EXAMINE WITNESSES.

A commission for the examination of witnesses in a foreign country, directed the commissioners to examine the witnesses on interrogatories, and to reduce the examinations into writing in the English language, and send the same to England, and to swear an interpreter to interpret the depositions of such witnesses as did not understand the English language. It appeared by the return that the depositions, in the first instance, were reduced into writing in the foreign language, and translated by the interpreter into the English language, within an interval of six weeks: *Held*, that the commission was well executed by the commissioners returning the depositions so translated into the English language. *Atkins v. Palmer*, E. 2 G. 4. 377

COMMON.

Where the plaintiff being possessed of house and land in E., had for sixty years exercised rights of common in W.; but it appeared, that this was done near the boundary of two commons of W. and E., which lay open and unenclosed, adjacent to each other; and it also appeared, that the parties exercising the right did not at the time know the exact boundary, and that plaintiff had, on a previous en-

closure of the E. common, obtained an allotment there in respect of his estate: *Held*, that the judge was right in leaving it to the jury to say, whether the evidence was referable to an exercise of the right in E., and a mistake of the boundary, or to an exercise of the right in W. *Hetherington v. Vane*, E. 2 G. 4. 428

COMPOSITION DEED.

Before the execution of a composition deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void, unless all the creditors executed it. The surety, at the same interview, afterwards executed the deed in the ordinary way, without saying any thing at the time of execution. The deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors: *Held*, that this was to be considered a delivery of the deed as an escrow, and that all the creditors not having executed it, the surety was not bound. *Johnson v. Baker*, E. 2 G. 4. 440

CONTEMPT.

1. A court of general jail delivery has the power to make an order to prohibit the publication of the proceedings pending a trial likely to continue for several successive days, and to punish disobedience to such order by fine.

Service of an order of such court, calling upon the editor of a newspaper "to answer for contemptuously publishing such proceedings," at the office at which the newspaper was published, is good service within the 38 G. 3, c. 78, s. 12; and the editor not having appeared the fine was held to be properly imposed upon him in his absence. *The King v. Clement*, H. 1 and 2 G. 4. 218

2. A judge at nisi prius has the power of fining a defendant for a contempt committed by him in the course of addressing the jury. *The King v. Davison*, H. 1 and 2 G. 4. 329

CONVICTION.

1. By 50 G. 3, c. 48, s. 25, it is provided, that any party aggrieved by the conviction under that act, who shall enter into a recognisance to appear at the next sessions, shall be at liberty to appeal to such sessions: *Held*, that this dispenses with the necessity of any notice of appeal; and that, if the party duly enter into the recognisance, the sessions are bound to hear the appeal. *The King v. The Justices of Essex*, H. 1 and 2 G. 4. 276
2. In a conviction of defendant for causing to be acted at a certain place called the Coburg Theatre, in the parish of St. Mary, Lambeth, for gain and reward, a certain entertainment of the stage called Richard

the Third, the evidence set forth was, that the defendant was seen once or twice at the rehearsals of Richard; that another person was stage manager; that defendant engaged I. S. to perform, and gave him a check for the amount of his benefit: *Held*, that this was sufficient to warrant the justices in drawing the conclusion, that the defendant caused the play of Richard the Third to be performed.

The conviction also stated, after the appearance and plea of defendant, that divers credible witnesses, to wit, I. S., &c., came before the justices upon their several oaths, to them severally and respectively, and in the presence of the said I. S., &c., duly administered: *Held*, that taking it altogether, it did substantially appear that the oath was administered to the witnesses in the presence of the magistrates.

The evidence also stated, that the Coburg Theatre was in the parish of Lambeth, and the adjudication of the penalty was to the poor of the parish of St. Mary, Lambeth: *Held*, that this was no variance, it not appearing that there were two distinct parishes so named. *The King v. Glossop*, T. 3 G. 4. 616

COPYHOLD.

A copyhold was surrendered to the use of husband and wife, for their natural lives and the life of the longer liver of them, and from and after the decease of the survivor of them, to the right heirs of the survivor for ever: It was held, that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor. *Doe dem. Dorner v. Wilson*, H. 1 and 2 G. 4. 803

CORPORATION.

A by-law of a corporation directed that, upon the happening of any vacancy in the number of twenty-four common councilmen, such vacancies should be filled by the freemen inhabiting the town; and that a court should be holden once every year, at which it should be lawful for the bailiffs to admit to the freedom of the town, such persons as had been resident therein for one whole year: *Held*, that this by-law did not give to every person who had been so resident for that period, an absolute right to be admitted to the freedom of the borough; and the court refused a mandamus to the bailiffs to admit such a person. *The King v. The Bailiffs and Corporation of Eye*, H. 1 and 2 G. 4. 271

COSTS.

In trespass, two defendants appeared by the same attorney, and pleaded, first, general issue, and second, separate justi-

fications. A. obtained a verdict generally, and B. obtained a verdict on his justification, but the plaintiff succeeded against him on the general issue: *Held*, that B. was not entitled to any costs on the issue found for him.

2d, That the master, in taxing A.'s costs, was right in allowing only one-half of the attorney's costs for appearance, &c.

3d, That the costs due from the plaintiff to A. could not be set off against the costs due from B. to the plaintiff. *Hobroyd v. Breare*, M. 1 G. 4. 43, 700

COUNTY.

The court will not take judicial notice of the local situation and distances of the different places in the counties of England from each other; and therefore, where a return to an habeas corpus stated, that the prisoner was found on board a vessel, discovered within eight leagues of that part of the coast of G. B. called Suffolk, to wit, within eight leagues of O., in that county, it was held not to be averred with sufficient certainty, that the vessel was not within four leagues of the coast of G. B., between the North Foreland in Kent, and Beachy Head in Sussex. *Deybell's case*, H. 1 and 2 G. 4. 243

COVENANT.

A covenant by a lessor to supply the premises demised, (which were two houses,) with a sufficient quantity of good water, at a rate therein mentioned for each house, is a covenant that runs with the land, and for the breach of which the assignee of the lessee may maintain an action against the reversioner. *Jourdain v. Wilson*, H. 1 and 2 G. 4. 266

CUSTOM.

A custom that none but a freeman or the widow or partner of a freeman, should sell by retail in a city, or the suburbs, is valid in law. *The Mayor of York v. Welbank*, E. 2 G. 4. 438

DEATH.

See EVIDENCE.

DEED.

See ESCROW.

By deed, a mortgage conveyed to the mortgagor the legal estate on being paid the mortgage-money, and the latter reconveyed it to trustees, for the purpose of securing an annuity. At the time of the execution by the mortgagee, there were several blanks in the deed, but not in that part which affected him. The blanks left were for the sums to be received by the mortgagor from the grantees of the annuity, and were all filled up at the

time of the execution of the deed by the mortgagor; but several interlineations were made in that part of the deed after the execution by the mortgagee. It was held that the deed was not therefore void, but operated as a good conveyance of the estate from the mortgagor to the trustees for the payment of the annuity. *Doe dem. Lewis v. Bingham*, T. 2 Geo. 4. 672

Held, also, that it was not incumbent on the plaintiff in ejectment, brought on this deed, to prove that the annuity was duly enrolled. *Ibid.*

Held, also, that the tenant in possession was not competent to prove that the witness, and not the defendant, was the possessor of the land. *Ibid.*

DEVIATION.

See INSURANCE, 1.

DEVISE.

See EVIDENCE, 2.

DISTRESS.

A reasonable time after the expiration of five days from the time of distress, is by law allowed to the landlord, for appraising and selling the goods distrained. *Pitt v. Shew*, H. 1 and 2 G. 4. 208

EASEMENT.

See ACTION ON THE CASE, 3.

EJECTMENT.

See RULES OF COURT.

ENCLOSURE ACT.

The determination of the commissioners under an enclosure act, as to the boundaries of a parish to be enclosed, is not conclusive of the fact as to what were the boundaries antecedently to such determination. *The King v. The Inhabitants of St. Mary*, E. 2 G. 4. 462

ESCROW.

Before the execution of a composition deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void, unless all the creditors executed it. The surety, at the same interview, afterwards executed the deed in the ordinary way, without saying any thing at the time of execution: the deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors: *Held*, that this was to be considered a delivery of the deed as an escrow, and that all the creditors not having executed it, the surety was not bound. *Johnson v. Baker*, E. 2 G. 4. 440

EVIDENCE.

1. In the proof of a pedigree, the dying declarations of A., as to the relationship

of the lessor of the plaintiff to the person last seized, are not receivable in evidence. *Doe dem. Sutton v. Ridgeway*, M. 1 G. 4. 53

2. A testator, by his will, devised to Matthew W., his brother, and Simon W., his brother's son, a certain estate. It appeared that the testator had three brothers, each of whom had a son of the name of Simon living at the time of the testator's death: *Held*, that the proof of this fact did not raise any latent ambiguity in the will, so as to let in parol evidence of declarations of the testator, as to the person intended; it being clear, that the person entitled was Simon, son of Matthew. *Doe dem. Westlake v. Westlake*, M. 1 G. 4. 57

3. On an information for writing, composing, and publishing a libel in the county of L. it appeared that the defendant, on the 22d August, wrote and composed the libel in L., and that he was seen in L. on that and the following day. On the 24th, the libel was delivered in the county of M. (one hundred miles off) by A. to B., being enclosed in an envelope addressed to A., containing written directions to A. to forward the libel to B., by whom it was subsequently published in M. The envelope was open; and it was not proved that there was on it any trace of a seal or post-mark. A. was not called at the trial as a witness by either party; nor was it proved that he was a resident, or had been about that time in L.: *Held*, by three justices, (dissentiente BAYLEY, J.) that this was evidence on which the jury might properly be left to presume that the libel was delivered open to A. in L.

Held, also, by three justices, (BAYLEY, J., dubitante,) that a delivery at the post-office in L. of a sealed letter, enclosing a libel is a publication of the libel in L. *Held*, also, by three justices, (BAYLEY, J., dubitante,) where a defendant writes and composes a libel in L. with the intent to publish, and afterwards publishes it in M., that he may be indicted for a misdemeanor in either county.

And, *per totam Curiam*, where a libel imputes to others the commission of a triable crime: *Held*, that evidence of the truth of it is inadmissible. *Held*, also, where, in summing up, the judge told the jury that, the intention was to be collected from the paper itself, unless explained by the mode of publication, or other circumstances; and that, if its contents were likely to excite sedition, &c., defendant must be presumed to intend that which his act was likely to produce; and that, if they found such to be the intent, he was of opinion it was a libel; and that they were to take the law from him, unless they were satisfied that he was wrong; that this was a correct mode of

- leaving the question to the jury under 32 G. 3, c. 60, s. 1.
- Quere*, whether the writing and composing of a libel with intent to publish, but not followed by publication, be an offence. *The King v. Sir F. Burdett*, M. 1 G. 4. 95
4. In trespass, the declaration was for taking goods, chattels, and effects: *Held*, that the plaintiff might recover the value of fixtures under these words. *Pitt v. Shew*, H. 1 and 2 G. 4. 206
5. In an action against an attorney, for negligence in the negotiation of an annuity, the party who, on the face of the deed, appeared to be the grantor, is a competent witness to prove it a forgery. *Hunter v. King*, H. 1 and 2 G. 4. 209
6. In assumpsit, by the provisional assignee of a bankrupt, defendant pleaded the general issue: *Held*, that the fact of the bankrupt's estate having been assigned by the provisional assignee to the new assignees, between the time of issuing the latitatis and the delivery of the declaration, is no ground of nonsuit upon a plea of non-assumpsit. *Quere*, whether it would have been an answer to the action, if specially pleaded. *Page v. Bauer*, E. 2 G. 4. 345
7. In assumpsit, by one of two surviving partners, the fact of the plaintiff being surviving partner must be stated in the declaration; and, therefore, a count for goods sold by him to the defendant, is not supported by proof that the goods were sold by the plaintiff and his deceased partner. *Jell v. Douglass*, E. 1 G. 4. 374
8. Entries in a steward's book above thirty years old, and coming from the proper custody, are admissible in evidence, without proving the handwriting of the steward.
- Sembler*, that the rule extends to all written documents coming from the proper custody. *Wynne, Bart. v. Tyrwhitt*, E. 2 G. 4. 376
9. Declaration stated, that defendant bargained for and bought of plaintiff a quantity of E. I. rice, according to the conditions of sale of the E. I. Company, to be put up at the next E. I. Company's sale by the proprietors, if required, at a certain price, there mentioned. The proof was, that, besides these conditions, the rice was sold per sample. This is no variance; the words "per sample" not being a description of the commodity sold, but a collateral engagement that it shall be of a particular quality. *Parker v. Palmer*, E. 2 G. 4. 387
10. In trover by A. against B., C. is a competent witness to prove property in himself. *Ward v. Wilkinson*, E. 2 G. 4. 410
11. Where the plaintiff, being possessed of house and land in E., had, for sixty years, exercised rights of common in W.; but it appeared that this was done near the boundary of the two commons of W. and E., which lay open and unenclosed adjacent to each other; and it also appeared that the parties exercising the right did not, at the time, know the exact boundary, and that plaintiff had, on a previous enclosure of the E. common, obtained an allotment there in respect of his estate: *Held*, that the judge was right in leaving it to the jury to say, whether the evidence was referable to an exercise of the right in E., and a mistake of the boundary, or to an exercise of the right in W. *Hetherington v. Vane*, E. 2 G. 4. 428
12. The fact of a tenant for life not having been seen or heard of for fourteen years by a person residing near the estate, although not a member of his family, is *prima facie* evidence of the death of the tenant for life. *Doe dem. Lloyd v. Deakin*, E. 2 G. 4. 433
13. In assumpsit, for not indemnifying plaintiff, in consequence of his having become bail for A. in an action at the suit of B., it was stated that B., in Michaelmas term 58 G. 3, recovered against plaintiff. The judgment given in evidence was in Hilary term: *Held*, that this was no variance, inasmuch as this was not matter of description, but an allegation in substance that the judgment had been obtained before the commencement of the action. *Phillips v. Shaw*, E. 2 G. 4. 435
14. A party, on being asked for the payment of his attorney's bill, admitted that there had been such a bill; but stated, that it had been paid to the deceased partner of the attorney, who had retained the amount out of a floating balance in his hands. *Quere*, whether, in order to take the case out of the statute of limitations, evidence is admissible to show that the bill had never in fact been paid in this manner.
- Sembler*, that such evidence is admissible, if at all, only where the defendant states the debt to be discharged by particular means, to which he refers with precision, and where he has designated the time and mode, so strictly, that it is impossible it could be discharged in any other manner than that specified *Beale v. Nind*, T. 2 G. 4. 568
15. Upon a parol demise, rent to take place from the following Lady-day, evidence of the custom of the country is admissible to show that, by "Lady-day," the parties meant "Old Lady-day." *Doe dem. Hall v. Benson*, T. 2 G. 4. 588
16. In a conviction of defendant for causing to be acted at a certain place called the Coburg Theatre, in the parish of St. Mary, Lambeth, for gain and reward, a certain entertainment of the stage called Richard

the Third, the evidence set forth was, that the defendant was seen once or twice at the rehearsals of Richard; that another person was stage manager; that defendant engaged J. S. to perform, and gave him a check for the amount of his benefit: *Held*, that this was sufficient to warrant the justices in drawing the conclusion, that the defendant caused the play of Richard the Third to be performed.

The conviction also stated, after the appearance and plea of defendant, that divers credible witnesses, to wit, J. S., &c., came before the justices upon their several oaths, to them severally and respectively, and in the presence of the said J. S., &c., duly administered: *Held*, that taking it altogether, it did substantially appear that the oath was administered to the witnesses in the presence of the magistrates.

The evidence also stated, that the Coburg Theatre was in the parish of Lambeth, and the adjudication of the penalty was to the poor of the parish of St. Mary, Lambeth: *Held*, that this was no variance, it not appearing that there were two distinct parishes so named. *The King v. Gloopo*, T. 2 G. 4. 616

17. The clerk of the defendant was the subscribing witness to a bond, and when he was subpoenaed, said that he would not attend, and the trial had been put off twice in consequence of his absence. Search had also been made at the defendant's house, and in the neighbourhood, and upon receiving information at the defendant's that the witness was gone to Margate; inquiry was there made without success. *Held*, that under these circumstances, evidence of his handwriting was admissible. *Burt v. Walker*, T. 2 G. 4. 697

EXCHEQUER BILL.

See TROVER, 1.

EXCISE.

See APPEAL, 3.

FACTOR.

A quantity of oats having been consigned by a merchant abroad, to be sold by T. S., who was a merchant as well as factor, he placed them in the hands of A., a corn-factor, as a security for advances made by him; but the oats were not to be sold without the consent of T. S. They remained in A.'s possession, upon these terms, for nine months, when they were transferred to A. by a sale at the market price. No money actually passed, nor were any account sales rendered; but the amount of the price was allowed in account between T. S. and A., leaving a

balance in favour of the latter: *Held*, that this was in substance a pledge, and not a sale by the factor; and that no property passed to A., although the jury had found it to be a bona fide transaction. *Kuckein v. Wilson*, E. 2 G. 4. 443

FINE.

The Court of Quarter Sessions cannot impose more than one fine for the non repair of a bridge. *The King v. The Inhabitants of Machynleth*, E. 2 G. 4. 469

FORFEITURE.

See LANDLORD AND TENANT, 2.

FOREIGN ATTACHMENT.

See PLEADING, 18.

FREEMEN.

See CUSTOM, 1.

FRAUDS, STATUTE OF.

1. By the 4th section of statute of frauds, an agreement to pay the debt of another must, in order to give a cause of action be in writing, and must contain the consideration for the promise, as well as the promise itself, and parol evidence of the consideration is inadmissible. *Saunders v. Wakefield*, T. 2 G. 4. 595
2. A trust created by a defendant, in favour of himself and another person, is not a trust within 29 Car. 2, c. 3, s. 10, that clause being confined to cases where the trustees are seized or possessed in trust for a defendant alone, and not jointly with another person. *Doe v. Greenhill*, T. 2 G. 4. 684

FREIGHT

By a charter-party, freight was agreed to be paid for the use or hire of the ship at a certain rate per ton, for a voyage out and home, in manner following, viz., a certain sum in advance on the ship's clearing outwards, and the residue half in cash and half in approved bills, upon the delivery of the homeward cargo; the owner also appointed C. S. master at the request of the charterer, who executed a bond, conditioned for the faithful performance of the master's duty; and the owner expressly instructed C. S. to be careful to sign all bills of lading with the clause, "freight payable as by charter-party." The ship was consigned to C. and Co., in Calcutta, by whom she was put up, for her homeward voyage, as a general ship, and different merchants shipped goods by her, C. and Co., taking for homeward freight bills payable sixty days after delivery of the cargo; and a new master having been appointed by C. and Co., in conjunction with C. S., signed bills of lading with the clause, "paying freight agreeable to freight bill." The freight bills were made payable in London to B and Co., to whom the charterer was in-

debted for advances on the outward cargo, and who, as well as C. and Co., were cognisant of the terms of the charter-party: *Held*, that the owner of the ship had a lien on these goods to the extent of the homeward freight.

C. and Co. also put on board the ship goods purchased by them on account of the charterer; but he being indebted to them, and B. and Co. their agents, those goods were, by the bill of lading, consigned to B. and Co.: *Held*, that as between the owner of the ship and B. and Co. the goods were to be considered as the goods of the charterer, and liable to the owner's lien on them for the freight due by charter-party.

In the charter-party, the freighter promised to pay and defray two-thirds of the port-charges: the owner having paid the whole, was held to have no lien on the goods shipped for those charges. *Faith v. The East India Company*, T. 2 G. 4.

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that the prisoner was found on board a vessel, discovered within eight leagues of that part of the coast of G. B. called Suffolk, to wit, within eight leagues of O., in that county it was held not to be averred with sufficient certainty, that the vessel was not within four leagues of the coast of G. B., between the North Foreland, in Kent, and Beachy Head in Sussex. *Deybel's case*, H. 1 and 2 G. 4.

2. Where a return to a habeas corpus stated that a vessel, with smuggled goods on board, was found at the fish-market, within the limits of the ancient town of Rye: *Held*, that it did not come within the 24 G. 3, sess. 2, c. 47, s. 1, by which, if a vessel be found at anchor, or hovering within the limits of any of the ports of this kingdom, or within four leagues of the coast thereof, with smuggled goods on board, she becomes liable to forfeiture. *Soudan's case*, H. 1 and 2 G. 4. 294

3. Where the return to a habeas corpus stated that an English seaman being found on board a ship liable to forfeiture under 45 G. 4, c. 121, s. 1, was carried before a magistrate, and upon due proof, as by the statute in that case made and provided is required, was committed, &c.: *Held*, that this was insufficient; and that it was necessary to state distinctly what proof was given, in order that the court might see whether it was the due proof required by the 7th section of the act. *Nash's case*, H. 1 and 2 G. 4. 295

GAMING.

In an action against the drawer of a bill, payable at a particular place, it is no defence that no notice of the dishonour has been given to the acceptor; nor is it any defence, that the bill was accepted for a gaming debt, if it be endorsed over by the drawer, for a valuable consideration to a third person, by whom the action is brought. *Edwards v. Dick*, H. 1 and 2 G. 4.

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GLEBE.

See Actions on the Case.

GRANT.

See PATENT, 1.

GUNPOWDER.

A license for the exportation of gunpowder was granted, on the petition of A. B., on behalf of himself and others, on condition that the merchant exporter should give a certain security therein mentioned, A. B., the manufacturer of the gunpowder, sold it to C. D., and contracted to deliver it free on board a ship: *Held*, that the condition of this license was not complied with by A. B.'s giving the required security, he not being the merchant exporter within the meaning of the license. *Carvelo v. Britten*, M. 1 G. 4.

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1. A licensed auctioneer going from town to town in a public stage-coach, and sending goods by public wagons, and selling the same on commission by retail or by auction, at the different towns, is a trading person within the meaning of the 60 G. 3, c. 41, s. 6, and must take out a hawker's and pedler's license. *The King v. Turner*, E. 2 G. 4. 510
2. A person travelling from town to town, and having packages of books, &c., sent after him by public conveyance, and taking rooms at each town, and there selling such books, &c., by retail, by auction, is a trading person within the 50 G. 3, c. 41, s. 7. *Dean q. & v. King*, E. 2 G. 4. 517

HIGHWAY.

1. Where in an indictment against a township for non-repair of a road, the prescription stated and proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which, but for such usage, would be repairable by the parish at large: *Held*, that this places the township in the situation of a parish, and that it is necessary for the defendants to show by evidence some

HABEAS CORPUS.

1. The court will not take judicial notice of the local situation and distances of the different places in the counties of England from each other; and therefore, where a return to an habeas corpus stated,

- other persons in certainty who are liable, in order to deliver themselves from their liability to repair. *The King v. The Inhabitants of Hatfield*, M. 1 G. 4. 75
2. Where a road was set out by commissioners under a local act, and certain persons only were by the act to use it, but in fact it had been used by the public for many years, it was held that this was not sufficient evidence of a dedication to the public; and that if it was, there being no evidence that the parish had acquiesced in that dedication, it was not a public road which the parish were bound to repair. *The King v. St. Benedict, (The Inhabitants of)* E. 1 G. 4. 447
3. In a plea by the inhabitants of a county, that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge situate within the township, it is not necessary to state any consideration for such prescription. *The King v. The Inhabitants of West Riding of Yorkshire*, T. 2 G. 4. 623

HOSPITAL.

A room in a parish workhouse, licensed pursuant to 13 G. 3, c. 82, and appropriated to the reception of, and used for the purpose of delivery of pregnant women resident within the parish, whether settled there or elsewhere, and the expense of which room was defrayed, in common with the general expenses of the workhouse, out of the parish rates, is not an hospital or place within the 13 G. 3, c. 82, s. 3. *The King v. The Inhabitants of Manchester*, E. 2 G. 4. 504

INSANITY.

Where the return to a writ of latitat stated, that the defendant was insane, and could not be removed without great danger, and continued so till the return of the writ, the court refused an attachment against the sheriff. *Covenah v. Collett*, H. 1 and 2 G. 4. 279

INSOLVENT DEBTOR.

1. A creditor of an insolvent trader, may, after the debtor's discharge under the 58 G. 3, c. 102, take out a commission of bankruptcy against him; and his debt, although included in the insolvent schedule, will be a sufficient petitioning creditor's debt at law to support the commission. *Jellis, assignee of Routledge, v. Mountford*, H. 1 and 2 G. 4. 256
 2. An insolvent debtor having petitioned the insolvent court to be discharged under the act, a creditor gave notice of his intention to oppose him, on the ground that the debt was fraudulently contracted. To induce the latter to withdraw his op-
- position, the insolvent agreed to execute within three days after his discharge, a warrant of attorney for the debt, and, in the mean time, to give a promissory note of a third person for the amount, which was to be delivered up on the execution of the warrant of attorney. The insolvent was discharged, and the warrant of attorney was executed on the delivery up of the note. The court set aside the warrant of attorney, and the judgment entered up thereon, on the ground that the agreement to which they were founded was contrary to the policy of the insolvent act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects, which the legislature intended to be distributed among all the creditors. *Jackson v. Davison*, T. 2 G. 4. 691

INSURANCE.

See LICENSE.

1. Policy of insurance from Para to New York, with leave to call at any of the Windward and Leeward islands on the passage, and to discharge, exchange, and take on board the whole or any part of any cargo, at any ports or places, particularly at all or any of the Windward and Leeward islands, without being deemed any deviation: *Held*, on this policy, the ship having proceeded to two of the Leeward islands for a purpose wholly unconnected with the voyage, that it was a deviation, and vitiated the insurance. *Hammond v. Reid*, M. 1 G. 4. 73
2. Upon a policy effected after the declaration of war by America, but before it was known in England, where it was not stated in the policy, nor communicated to the underwriter, that the assured was an American subject, and the loss happened in consequence of a seizure by the American goverment for a forfeiture for the breach of their non-importation act: *Held*, that the action could not be maintained, even after the war had terminated. *Campbell v. Innes*, E. 2 G. 4. 423
3. The importation of goods from America, in a vessel American built, though owned by British subjects, is not legalized by 49 G. 3, c. 59. *Same v. Same*, E. 2 G. 4. 426
4. Where the memorandum for charter stated one half of the freight to be paid in cash on unloading and right delivery and the remainder by bill on London a, four months' date; and then, after containing stipulations for unloading, discharging, demurrage, &c., added, "the captain is to be supplied with cash for the ship's use;" and in pursuance of the last stipulation, the master drew a bill of the freighters, which was duly accepted and paid: *Held*, that this was not to be considered a payment of freight in ad-

vance, but as a loan to the owner of the ship and that (the ship having been lost on her homeward voyage) the freighters had no insurable interest in such bill.
Manfield v. Mailland, T. 2 G. 4. 582

INSURANCE BROKER.

1. An insurance broker is only entitled to receive payment for the assured from the underwriter in money; and therefore, a custom to set off the general balance due from the broker to the underwriter in the settlement of a particular loss is illegal. *Todd v. Reid*, H. 1 and 2 G. 4. 210
 2. A policy delivered to an insurance broker for the purpose of settling a loss, is adjusted by the underwriter, payable at a month. The broker charges the underwriter in account for the loss, and transmits to the assured an account in which he states himself to be debtor for the amount of the loss: and for the balance of that account the assured draws a bill upon the broker, which the latter accepts but does not pay. The underwriter's name having been struck off the policy, it was held that he was not discharged. *Russell v. Bangley*, E. 2 G. 4. 395
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JURY.

1. Upon the trial of an information for a libel only ten special jurymen appeared, and two talesmen were sworn on the jury. It is no ground for a new trial that two of the non-attending special jurymen named in the panel had not been summoned, though it appeared that this fact was unknown to the defendant, until after the trial. *The King v. Hunt*, E. 2 G. 4. 430
2. No challenge can be taken either to the array or to the polls, until a full jury have appeared; and therefore, where the challenges are taken previously, they are irregularly made. *The King v. Edmonds and Others*, E. 2 G. 4. 471

The disallowing of a challenge is not a ground for a new trial, but for a *venire de novo*; and every challenge must be propounded in such a way as that it may be put at the time upon the *nisi prius* record. So that the adverse party may either demur, or counterplead, or deny the matter of challenge, in which last case only triers are to be appointed; and, therefore, where the challenges were not put on the record, the defendants were held not to be in a condition to ask the opinion of this court, as a matter of right upon their sufficiency. *Ibid.*

There can be no challenge to the array on the ground of unindifference in the master of the Crown Office, he being the officer of the court expressly appointed

to nominate the jury. The only remedy in such a case is to apply to the court by motion to appoint some other officer to nominate the jury. 471

The master of the Crown Office, in nominating the jury, selected the names of the jurors, and did not take them by chance from the freeholder's book. He also took those only whose names had the addition of "esquire;" and included some persons who were in the commission of the peace: *Held*, that in so doing he was perfectly right. *Ibid.*

He also included in his nomination some persons, who, as grand jurymen, had found the indictment, and persisted in his opinion as to their sufficiency, unless the crown would consent to abandon them, which was done, and others were then substituted in their places: *Held*, that he was wrong in his opinion, but that there was no ground for presuming partiality. *Ibid.*

The sheriff's officer had neglected to summon one of the twenty-four special jurymen returned on the panel: *Held*, that this was no ground of challenge to the favour for unindifference on the part of the sheriff. *Ibid.*

Held, also, that it is not competent to ask jurymen (whether special jurymen or tradesmen) if they have not, previously to the trial, expressed opinions hostile to the defendants, and their cause, in order to found a challenge to the polls on that ground; but that such expressions must be proved by extrinsic evidence. *Ibid.*

JUSTICES.

The power given to magistrates, under 35 G. 3 c. 101, s. 2, of ordering the charges incurred during the suspension of an order of removal, to be paid by the parish to which the order is made, is confined to two cases only, viz., the death or removal of the pauper; and, therefore, where a pauper, during the suspension of an order of removal, became irremovable in consequence of an estate descended to him: *Held*, that such a case was not within the act; and that the pauper, not having been removed, no order for the payment of any charges incurred during the suspension of the original order of removal could be made. *The King v. The Inhabitants of Chagford*, H. 1 and 2 G. 4. 235

LANDLORD AND TENANT.

1. A reasonable time, after the expiration of five days from the time of distress, is by law allowed to the landlord for appraising and selling the goods distrained. *Pitt v. Shew*, H. 1 and 2 G. 4. 208

2. A lease of coal mines reserved a royalty rent for every ton of coals raised, and contained a proviso that the lease should be void, to all intents and purposes, if the tenant should cease working at any time two years. After the working had ceased more than two years, the lessor received rent: *Held*, that a tenancy from year to year was not thereby created; for the lease was not absolutely void by the cessor to work, but voidable only at the option of the lessor; and that he might avoid the lease upon any cessor to work commencing two years before the day of demise in the ejectment. *Doe dem Bryan v. Branches*, E. 2 G. 4. 401
3. Upon a parol demise, rent to take place from the following Lady-day, evidence of the custom of the country is admissible to show, that, by "Lady-day," the parties meant "Old Lady-day." *Doe dem Hall v. Benson*, T. 2 G. 4. 588

LEASE.

See LANDLORD AND TENANT, 2.

LIBEL.

1. On an information for writing, composing, and publishing a libel in the county of L. it appeared that the defendant, on the 22d August, wrote and composed the libel in L., and that he was seen in L. on that and the following day. On the 24th, the libel was delivered in the county of M. (one hundred miles off) by A. to B., being enclosed in an envelope addressed to A., containing written directions to A. to forward the libel to B., by whom it was subsequently published in M. The envelope was open; and it was not proved that there was on it any trace of a seal or post-mark. A. was not called at the trial as a witness by either party; nor was it proved that he was a resident, or had been about that time in L.: *Held*, by three justices, (dissentiente *BAYLEY*, J.) that this was evidence on which the jury might properly be left to presume that the libel was delivered open to A. in L. *Rex v. Burdett, Bart.* 95

Held, also, by three justices, (*BAYLEY*, J., dubitante,) that a delivery at the post-office in L. of a sealed letter, enclosing a libel is a publication of the libel in L. *Held*, also, by three justices, (*BAYLEY*, J., dubitante,) where a defendant writes and composes a libel in L. with the intent to publish, and afterwards publishes it in M., that he may be indicted for a misdemeanor in either county. *Ibid.*

And, *per totam Curiam*, where a libel imputes to others the commission of a triable crime: *Held*, that evidence of the truth of it is inadmissible. *Held*, also, where, in summing up, the judge told the jury that the intention was to be collected from the paper itself, unless explained by the mode of publication, or other cir-

cumstances; and that, if its contents were likely to excite sedition, &c., defendant must be presumed to intend that which his act was likely to produce; and that, if they found such to be the intent, he was of opinion it was a libel; and that they were to take the law from him, unless they were satisfied that he was wrong; that this was a correct mode of leaving the question to the jury under 32 G. 3, c. 60, s. 1. 95

Quare, whether the writing and composing of a libel with intent to publish, but not followed by publication, be an offence. *Ibid.*

2. Where an information alleged that a libel was published of and concerning the government of the country, and the libel did not in express terms, charge the acts to have been done by the government or its order, the court are to take the whole libel altogether, to interpret it in the way in which ordinary persons would understand it, and to judge, from the whole tenor of it, whether it be written of and concerning the government; and the court having come to this conclusion, such an information was held good after verdict, although the record did not contain any averment of extrinsic facts, in order to show that the libel was written of and concerning the government. *Rex v. Burdett, Bart.* H 1 and 2 G. 4. 314

Where the information alleged that the defendant, intending to cause it to be believed that divers subjects of our lord the king had been inhumanly killed by certain troops of our lord the king, published a libel of and concerning the said troops; and the only innuendo in the libel was applied to the word *dragoons*, meaning the said troops of our said lord the king, and meaning thereby that divers liege subjects of our lord the king had been inhumanly cut down and killed by the said troops of our said lord the king: *Held*, after verdict, that this was sufficiently certain, without defining what particular troops were meant. *Ibid.*

Where a defendant was convicted of a libel, which, on the face of it, purported to have been written in consequence of his having read a statement of facts in different newspapers, an affidavit that he did read such statements in such newspapers may be received in mitigation of punishment; but an affidavit that the facts contained in those statements were true, is not admissible. *Ibid.*

3. Declaration for a libel published in a newspaper. Plea, that the libel was originally published in the H. Journal by I. S.; and that, at the time of publication by the defendant, it was stated in such publication that it was copied from that newspaper; and that, pursuant to statute 38 G. 3 c. 78, I. S. had made an affidavit

that he was the publisher of the H. Journal and still remained so at the time of publication of the libel: *Held*, that this plea was bad, inasmuch as the publication by the defendant, did not specify by name L. S. as the original publisher of the libel, but only named the journal. *Lewis v. Walter*, T. 2 G. 4. 605

Sembler, that even if L. S. had been named by the defendant when the latter published the libel, such publication, being of written slander, could not have been justified. *Ibid.*

Sembler, also, that the repetition of oral slander, accompanied by a declaration of the name of the original author, cannot be justified, unless such repetition be made without malice, and upon a fair and justifiable occasion. *Ibid.*

The libel stated in the declaration purported to be a speech of counsel at a trial of the plaintiff on a criminal charge; and it stated, after setting out the speech, that a witness was called, who proved all that had been stated by counsel, and that the defendant was immediately after that acquitted upon a defect in proving some matter of form. The plea stated, that in fact such a speech was made, and that the witness called proved all that had been so stated; but it did not set out the evidence, or justify the truth of the charges made in the counsel's speech: *Held*, that such plea was bad, inasmuch as a party could not be justified in publishing the result of evidence given in a court of justice, but must state the evidence itself. *Ibid.*

LICENSE.

A license for the exportation of gunpowder was granted, on the petition of A. B., on behalf of himself and others, on condition that the merchant exporter should give a certain security therein mentioned, A. B., the manufacturer of the gunpowder, sold it to C. D., and contracted to deliver it free on board a ship: *Held*, that the condition of this license was not complied with by A. B.'s giving the required security, he not being the merchant exporter within the meaning of the license. *Carmelo v. Britton*, M. 1 G. 4. 184

LIEN.

See FRAUD, 1.

1. The wharfage, &c. due upon goods imported was, by the course of trade, paid by the importer at the Christmas following the importation, whether the goods were in the mean time removed or not. The goods were sold to A., and, after Christmas, the merchant importer became bankrupt: *Held*, that there was no lien on the goods for the wharfage, &c., as against A. *Crawshay v. Homfray*, M. 1 G. 4. 50

2. A shipwright has a lien upon a ship for repairs. *Franklin v. Hosier*, H. 1 and 2 G. 4. 341
3. The plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record: *Held*, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied. *Merry v. Smith*, E. 2 G. 4. 466

LIMITATION.

A copyhold was surrendered to the use of husband and wife, for their natural lives and the life of the longer liver of them, and from and after the decease of the survivor of them, to the right heirs of the survivor for ever: *Held*, that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor. *Doe dem. Dormer v. Wilson*, H. 1 and 2 G. 4. 303

LIMITATIONS, STATUTE OF.

A party, on being asked for the payment of his attorney's bill, admitted that there had been such a bill; but stated, that it had been paid to the deceased partner of the attorney, who had retained the amount out of a floating balance in his hands. *Quere*, whether, in order to take the case out of the statute of limitations, evidence is admissible to show that the bill had never in fact been paid in this manner.

Sembler, that such evidence is admissible, if at all, only where the defendant states the debt to be discharged by particular means, to which he refers with precision, and where he has designated the time and mode, so strictly, that it is impossible it could be discharged in any other manner than that specified. *Bentle v. Nind*, T. 2 G. 4. 568

LORD'S ACT.

Notice under 22 G. 2, c. 28, must be given to a creditor fourteen clear days, exclusive both of the day of service and that of presenting the petition. *Zouch v. Empsey*, E. 2 G. 4. 522

MANDAMUS.

1. The Court of K. B. have no jurisdiction to grant a mandamus to magistrates to make an order of maintenance on a particular parish. *The King v. The Justices of Middlesex*, H. 1 and 2 G. 4. 296
2. A mandamus to the mayor of M. to convene a meeting, to proceed to an election, in order to fill up five vacancies in a select body, consisting of fifteen chief burgesses. Return by him, after stating objections to the title of several of the

remaining burgesses, that there were not within the borough eight legally elected chief burgesses by whom the election of others could be made; and that, for the several reasons before mentioned, he could not proceed to such election: *Held*, insufficient return, and peremptory mandamus awarded. *The King v. The Mayor of Monmouth*, E. 2 G. 4. 496

MARKET.

A prescription for toll of corn brought into a town, to be sold on a market day there, whereof any part is pitched within the market for sale, and which shall be there sold, is bad, inasmuch as there cannot be any toll in respect of goods not actually brought into the market. *Wells v. Miles*, T. 2 G. 4. 559

MASTER AND SERVANT.

Where defendant's servant wantonly, and not in order to execute his master's orders, strikes the plaintiff's horses, and thereby produces the accident, his master is not liable; but where, in the course of his employment, he so strikes, though injudiciously, his master is liable. *Croft v. Akens*, T. 2 G. 4. 590

MISTRIAL.

The record, in a case of felony at the quarter sessions, after stating the indictment, plea of not guilty, and verdict of guilty thereon, added, "that because it appeared to the justices, that after the jury had retired one of them had separated from his fellows, and conversed respecting his verdict with a stranger, it was considered that the verdict was bad;" and it was therefore quashed, and a *venire de novo* awarded to the next sessions. It then proceeded to set out the appearance of the parties at the next sessions, and the trial and conviction by the second jury; whereupon all and singular the premises being seen and considered, judgment was given, &c.: *Held*, upon a writ of error brought, that the judgment was right. *The King v. Fowler and Sexton*, H. 1 and 2 G. 4. 273

NAVIGATION LAWS.

The importation of goods from America, in a vessel American built, though owned by British subjects, is not legalized by 49 G. 3, c. 59. *Campbell v. Innes*, E. 2 G. 4. 496

NEWSPAPER, EDITOR OF.
*See Libel, s. Content, l.*NOTICE.
See Lord's Act.

PARTNERS.

1. In assumpsit, by one of two surviving partners, the fact of the plaintiff's being

surviving partner must be stated in the declaration; and, therefore, a count for goods sold by him to the defendant, is not supported by proof that the goods were sold by the plaintiff and his deceased partner. *Jell v. Douglas*, E. T. 2 G. 4. 374

2. The joint owners of a vessel engaged in the whale fishery, may sue a purchaser for the price of whale oil, although the contract of sale were made by one of the part-owners, and the purchaser did not know that other persons had any interest in the transaction. *Skinner v. Stocks*, E. 2 G. 4. 437

3. A merchant in London recommended consignments to a merchant abroad, and it was agreed, that the commission on all sales of goods recommended by one house to the other should be equally divided, without allowing any deduction for expenses: *Held*, that this was a participation in profit, and constituted a partnership between the parties *quod hoc*. *Cheaps v. Cromord*, T. 2 G. 4. 663

PORT CHARGES.

See Freight, l.

PATENT.

A patent for improvements in the construction of ships' anchors, windlasses, and chain-cables, cannot be supported unless there is novelty in each invention; and therefore, where it turned out that there was no novelty in the construction of the anchors, it was held, that the patent was wholly void. *Brunton v. Hanover*, T. 2 G. 4. 541

PAYMENT.

1. A policy delivered to an insurance broker for the purpose of settling a loss, is adjusted by the underwriter, payable at a month. The broker charges the underwriter in account for the loss, and transmits to the assured an account, in which he states himself to be debtor for the amount of the loss; and for the balance of that account the assured draws a bill upon the broker, which the latter accepts but does not pay. The underwriter's name never having been struck off the policy, it was held that he was not discharged. *Russell v. Bawley*, E. 2 G. 4. 395

PLEADING.

1. The court will not take judicial notice of the local situation and distances of the different places in the counties of England from each other; and therefore where a return to an *habeas corpus* stated that the prisoner was found on board a vessel, discovered within eight leagues of that part of the coast of G. B. called Suffolk, to wit, within eight leagues of O., in that county, it was held not to be averred with sufficient certainty, that

- the vessel was not within four leagues of the coast of G. B., between the North Foreland in Kent, and Beachy Head in Sussex. *Deybel's case*, H. 1 and 2 G. 4. 243
2. A covenant by a lessor to supply the premises demised, (which were two houses,) with a sufficient quantity of good water, at a rate therein mentioned for each house, is a covenant that runs with the land, and for the breach of which the assignee of the lessee may maintain an action against the reversioner. *Jourdain v. Wilson*, H. 1 and 2 G. 4. 266
3. Declaration in assumpsit, charging that the defendant was indebted to the plaintiff in five hundred quarts of wheat for tolls, without stating any value, is bad upon special demurral. *The Mayor of Reading v. Clarke*, H. 1 and 2 G. 4. 268
4. The record in a case of felony at the quarter sessions, after stating the indictment, plea of not guilty, and verdict of guilty thereon, added, that because it appeared to the justices, that after the jury had retired, one of them had separated from his fellows, and conversed respecting his verdict with a stranger; it was considered that the verdict was bad, and it was therefore quashed, and a venire de novo awarded to the next sessions. It then proceeded to set out the appearance of the parties at the next sessions, and the trial and conviction by the second jury; whereupon all and singular the premises being seen and considered, judgment was given, &c.: *Held*, upon a writ of error brought that the judgment was right. *Rex v. Howler and Sexton*, H. 1 and 2 G. 4. 273
5. Where a return to a habeas corpus stated that a vessel, with smuggled goods on board, was found at the fish-market, within the limits of the ancient town of Rye: *Held*, that it did not come within the 24 G. 3, sess. 2, c. 47, s. 1, by which, if a vessel be found at anchor, or hovering within the limits of any of the ports of this kingdom, or within four leagues of the coast thereof, with smuggled goods on board, she becomes, liable to forfeiture. *Soudan's case*, H. 1 and 2 G. 4. 294
6. Where the return to a habeas corpus stated that an English seaman being found on board a ship liable to forfeiture under 45 G. 4, c. 121, s. 1, was carried before a magistrate, and upon due proof, as by the statute in that case made and provided is required, was committed, &c.: *Held*, that this was insufficient; and that it was necessary to state distinctly what proof was given, in order that the court might see whether it was the due proof required by the 7th section of the act. *Nash's case*, H. 1 and 2 G. 4. 295
7. Where an information alleged, that a libel was published of and concerning the government of the country, and the libel did not, in express terms, charge the acts to have been done by the government or its order, the court are to take the whole libel together, to interpret it in the way in which ordinary persons would understand it, and to judge from the whole tenor of it, whether it be written of and concerning the government; and the court having come to this conclusion, such an information was held good after verdict, although the record did not contain any averment of extrinsic facts, in order to show that the libel was written of and concerning the government. *Rex v. Burdett, Bart.* H. 1 and 2 G. 4. 314
- Where the information alleged, that the defendant intending to cause it to be believed, that divers subjects of our lord the king had been inhumanly killed by certain troops of our lord the king, published a libel of and concerning the said troops; and the only innuendo in the libel was applied to the word *dragoons*, meaning the said troops of our said lord the king, and meaning thereby, that divers liege subjects of our lord the king had been inhumanly cut down and killed by the said troops of our said lord the king: *Held*, after verdict, that this was sufficiently certain, without defining what particular troops were meant. *Ibid.*
8. In assumpsit, by the provisional assignee of a bankrupt, defendant pleaded the general issue: *Held*, that the fact of the bankrupt's estate having been assigned by the provisional assignee to the new assignees, between the time of issuing the latitat and the delivery of the declaration, is no ground of nonsuit upon a plea of non-assumpsit. *Quere*, whether it would have been an answer to the action, if specially pleaded? *Page v. Bauer*. E. 2 G. 4. 345
9. In assumpsit by one of two surviving partners. The fact of the plaintiff's being surviving partner must be stated in the declaration; and therefore a count for goods sold by him to the defendant is not supported by proof that the goods were sold by the plaintiff and his deceased partner. *Jell v. Douglas*, E. 2 G. 4. 374
10. Declaration stated, that defendant bargained for and bought of plaintiffs a quantity of E. I. rice, according to the conditions of sale of the E. I. Company, to be put up at the next E. I. Company's sale by the proprietors, if required, at a certain price, there mentioned. The proof was, that the rice was sold per sample. This is no variance; the words "per sample" not being matter of description, but a collateral engagement that the goods sold shall correspond with the sample. *Parker v. Palmer*, E. 2 G. 4. 387
11. Husband and wife lived separate under

- a deed, by which he stipulated that his wife should enjoy, as her separate and distinct property, all effects, &c. which she might acquire, or which by any gift, grant, &c., or representation, she, or he in her right, might be entitled to; and that he would not do any act to impede the operation of that deed, but would ratify all lawful or equitable proceedings to be brought in his or their names, for recovering such real and personal estates; and the wife having, as executrix of R. M., commenced an action on a promissory note against defendants in the names of her husband and herself, the husband released the debt, which release was pleaded *puis darrien continuance*. The court, on application, ordered such plea to be taken off the record, and the release to be given up to be cancelled. *Innell v. Newman*, E. 2 G. 4. 419
12. In assumpsit, for not indemnifying plaintiff, in consequence of his having become bail for A. in an action at the suit of B., it was stated that B., in Michaelmas term 58 G. 3, recovered against plaintiff. The judgment given in evidence was in Hilary term: *Held*, that this was no variance, inasmuch as this was not matter of description, but an allegation in substance that the judgment had been obtained before the commencement of the action. *Phillips v. Shaw*, E. 2 G. 4. 435
13. The joint owners of a vessel engaged in the whale fishery may sue a purchaser for the price of whale oil, although the contract of sale were made by one of the part-owners, and the purchaser did not know that other persons had any interest in the transaction. *Skinner v. Stocks*, E. 2 G. 4. 437
14. A prescription for toll of corn brought into a town to be sold on a market day there, whereof any part is pitched within the market for sale, and which shall be there sold, is bad, inasmuch as there cannot be any toll in respect of goods not actually brought into the market. *Wells v. Miles*, T. 2 G. 4. 559
15. Where the plaintiffs hired a chariot for the day, appointed the coachman, and furnished the horses: *Held*, that they were properly described as owners and proprietors of it, in a declaration against a defendant for an accident arising from his servant's negligence in driving against the chariot.
- Held*, also, that where defendant's servant wantonly, and not in order to execute his master's orders, strikes the plaintiff's horses, and thereby produces the accident, his master is not liable; but where, in the course of his employment, he so strikes, although injudiciously, his master is liable. *Croft v. Alison*, T. 2 G. 4. 590
16. Declaration for a libel published in a newspaper. Plea, that the libel was originally published in the H. Journal by I. S.; and that, at the time of publication by the defendant, it was stated in such publication that it was copied from that newspaper; and that, pursuant to statute 38 G. 3 c. 78, I. S. had made an affidavit that he was the publisher of the H. Journal and still remained so at the time of publication of the libel: *Held*, that this plea was bad, inasmuch as the publication by the defendant, did not specify by name I. S. as the original publisher of the libel, but only named the journal.
- Sembler*, that even if I. S. had been named by the defendant when the latter published the libel, such publication, being of written slander, could not have been justified.
- Sembler*, also, that the repetition of oral slander, accompanied by a declaration of the name of the original author, cannot be justified, unless such repetition be made without malice, and upon a fair and justifiable occasion.
- The libel stated in the declaration purported to be a speech of counsel at a trial of the plaintiff on a criminal charge; and it stated, after setting out the speech, that a witness was called, who proved all that had been stated by counsel, and that the defendant was immediately after that acquitted upon a defect in proving some matter of form. The plea stated, that in fact such a speech was made, and that the witness called, proved all that had been so stated; but it did not set out the evidence, or justify the truth of the charges made in the counsel's speech: *Held*, that such plea was bad, inasmuch as a party could not be justified in publishing the result of evidence given in a court of justice, but must state the evidence itself. *Lewis v. Walter*, T. 2 G. 4. 605
17. In a plea by the inhabitants of a county, that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge situate within the township, it is not necessary to state any consideration for such prescription. *Rex v. The Inhabitants of West Riding*, T. 2 G. 4. 623
18. A plea of foreign attachment stated the custom to be, that if the plaintiff in the Mayor's Court allege that any other person or persons owes or owe to the then defendants any money that may be attached, and that the plaintiff below alleged, that he and another person owed to the defendant below a certain sum of money: *Held*, that such plea is bad, inasmuch as the person owing the money to the defendant must, within the custom as pleaded, be a different person from the plaintiff.
- Quere*, whether a custom for a party to
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- attach money in the hands of himself and partner, could be supported. *Nonell v. Hullett*, T. 2 G. 4. 646
19. Declaration stated, that plaintiff had cohabited with defendant as his mistress, and that it was agreed that no further immoral connexion should take place between them, and that defendant should allow her an annuity, as long as she should continue of good and virtuous life and demeanour; and thereupon, in consideration of the premises, and that the plaintiff would give up the annuity, defendant promised to pay as much as the annuity was reasonably worth: *Held*, bad upon general demurrer. *Bennington v. Walkis*, T. 2 G. 4. 650
20. Declaration in debt for tithes under 2 and 8 Edw. 6, c. 18 s. 1, omitting to state that the tithes had been yielded and paid, and of right ought to have been paid within forty years next before the passing of the act is bad even after verdict. *Bull v. Howard*, T. 2 G. 4. 655

POOR.

1. A select vestry for the management of the parish affairs existing by ancient custom, cannot elect another select vestry for the management of the poor within the 59 G. 3, c. 13. *The King v. Woodman and Others*, E. 2 G. 4. 507
2. Where a pauper, legally settled in the parish of A., having met with a severe accident in the parish of B., was carried into an adjacent parish to be cured, and remained there for a long period of time: *Held*, that he was to be considered as casual poor in the parish of C., and was irremovable; and that an order of removal to A., suspended, under the powers of 35 G. 3, c. 101, and a subsequent order on the overseers of A. to pay the intermediate charges incurred by the parish of C., were invalid. *The King v. The Inhabitants of St. Lawrence, Ludlow*, T. 2 G. 4. 660

PRACTICE.

See JURY.

1. Where the employment of an attorney is so connected with his professional character, as to afford a presumption that his employment was in consequence of that character; the court will interfere in a summary way to compel him faithfully to execute the trust reposed in him; and, therefore, where an attorney was employed by A., to collect and get in the effects due to him as administrator of another person, the court compelled the attorney to render an account to the executors of A. of the moneys, &c. received by him, although he had never been employed by A. or his executors to conduct any suit in law or equity on his or their behalf. *Aikin, In the Matter of the Executors of*, M. 1 G. 4. 47

2. An attorney in custody for debt loses his privilege, and may be detained upon mesne process, *Byles v. Willon, Gent. one &c.* M. 1 G. 4. 88
3. An agent employed to take out an attorney's annual certificate, having neglected so to do, and the attorney having from ignorance of the fact continued to practise, the court will only allow him to be readmitted upon payment of the arrears, and a fine. *Ex parte Leacroft*, M. 1 G. 4. 90
4. The bail to the sheriff are discharged by the defendant's giving a cognovit for payment of debt and costs. *Farmer v. Threlkelly*, M. 1 G. 4. 91
5. This court will set aside a judgment founded on an usurious security without compelling the defendant to pay the principal and interest. *Roberts v. Goff*, M. 1 G. 4. 92
6. Defendant having pleaded in abatement, that four others were jointly liable with himself, the plaintiff applied to the defendant's attorney to give the places of residence, and additions of those persons, which he refused, unless the action were discontinued. Under these circumstances, the court made a rule absolute for the defendant to deliver such particulars, or in default thereof, for setting aside the plea. *Taylor and Others v. Harris*, M. 1 G. 4. 93
7. A court of general jail delivery has the power to make an order to prohibit the publication of the proceedings pending a trial likely to continue for several successive days, and to punish disobedience to such order by fine.
- Service of an order of such court, calling upon the editor of a newspaper "to answer for contemptuously publishing such proceedings," at the office at which the newspaper was published, is good service within the 38 G. 3, c. 78 s. 12.; and the editor not having appeared, the fine was held to be properly imposed upon him in his absence. *The King v. Clement*, H. 1 and 2 G. 4. 218
8. The proceedings in an action on the bail bond having been stayed, the defendant pleaded to the original action, the general issue, and subsequently a plea of bankruptcy, *puis darrein continuance*. There being no affidavit, that the application to stay the proceedings was made on the part of the bail, the court now set aside the latter plea, and restrained the defendant to his plea of general issue, on the ground, that when the proceedings were stayed in the action on the bail bond, it was intended, that the defendant should only question the validity of the original debt. *Dowson v. Levi*, H. 1 and 2 G. 4. 249
9. The record in a case of felony at the quarter sessions, after stating the indict-

- ment, plea of not guilty, and verdict of guilty thereon, added, "that because it appeared to the justices, that after the jury had retired, one of them had separated from his fellows, and conversed respecting his verdict with a stranger, it was considered that the verdict was bad;" and it was therefore quashed, and a *venire de novo* awarded to the next sessions. It then proceeded to set out the appearance of the parties at the next sessions, and the trial and conviction by the second jury; whereupon all and singular the premises being seen and considered, judgment was given, &c.: *Held*, upon a writ of error brought, that the judgment was right. *The King v. Fowler and Sexton*, H. 1 and 2 G. 4. 273
10. Where the return to a writ of *latitatis* stated that the defendant was insane, and could not be removed without great danger, and continued so till the return of the writ, the court refused an attachment against the sheriff. *Cavenah v. Collett*, H. 1 and 2 G. 4. 280
11. A writ returnable on a *dies non* is altogether void, and cannot be amended by the court. *Kensworthy v. Pepys*, H. 1 and 2 G. 4. 288
12. The notice required by 13 G. 2, c. 18, s. 5, for removing an order of justices by *certiorari*, must state on the face of it the name of the party applying for the writ. *The King v. The Justices of Lancashire*, H. 1 and 2 G. 4. 289
13. The court will not compel the vestry clerk of a parish to produce, and permit copies to be taken of, documents from the parish chest in his custody, for any other than parochial purposes. *May v. Gwynne*, H. 1 and 2 G. 4. 301
14. Where a defendant was convicted of a libel, which, on the face of it, purported to have been written in consequence of his having read a statement of facts in different newspapers, an affidavit that he did read such statements in such newspapers may be received in mitigation of punishment; but an affidavit that the facts contained in those statements were true, is not admissible. *The King v. Burdett*, H. 1 and 2 G. 4. 314
15. A judge at nisi prius has the power of fining a defendant for a contempt committed by him in the course of addressing the jury. *The King v. Davison*, H. 1 and 2 G. 4. 329
16. The court may order a verdict to be entered for the plaintiff, when the cause was undefended at nisi prius, and the judge directed a nonsuit, with liberty to the plaintiff to move to enter a verdict. *Treacher v. Hinton*, E. 2 G. 4. 413
17. Husband and wife lived separate under a deed, by which he stipulated that his wife should enjoy, as her separate and distinct property, all effects, &c. which she might acquire, or which by any gift, grant, &c., or representation, she, or he in her right, might be entitled to; and that he would not do any act to impede the operation of that deed, but would ratify all lawful or equitable proceedings to be brought in his or their names, for recovering such real and personal estates; and the wife having, as executrix of R. M., commenced an action on a promissory note against defendants, in the names of her husband and herself, the husband released the debt; which release was pleaded *puis darrien continuance*. The court on application, ordered such plea to be taken off the record, and the release to be given up to be cancelled. *Innelli v. Newman*, E. 2 G. 4. 419
18. The plaintiff, after judgment recovered, scuttled the action with the defendant, and employed a new attorney to enter up satisfaction on the record: *Held*, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied. *Marr v. Smith*, E. 2 G. 4. 466
19. Notice under 32 G. 2, c. 28, must be given to a creditor fourteen clear days, exclusive both of the day of service and that of presenting the petition. *Zouch v. Empsey*, E. T. 2 G. 4. 523
20. Plaintiff in an inferior court, from which a cause is removed by *habeas corpus*, and a rule for better bail given, is not entitled to a *procedendo*, after render of defendant and notice of such render, although the render be made after the day on which the rule for better bail expires. *Johnson v. Walker*, E. 2 G. 4. 535
21. An arrest of a party, described in a *testatum specialis capias*, and in the affidavit to hold to bail, by the initials of his Christian name only, is irregular. *Reynolds v. Hawkin*, E. 2 G. 4. 536
22. An alias *scire facias* issued against bail must be left at the sheriff's office four days, exclusive both of the day of lodging it and the day of the return. *Wilson v. Parr*, E. 2 G. 4. 537
23. Delivery of declaration in ejectment to an agent of tenant in possession, who resided abroad, is sufficient to entitle the plaintiff to judgment against the casual ejector. *Doe v. Roe*, T. 2 G. 4. 653
24. An insolvent debtor having petitioned the insolvent court to be discharged under the act, a creditor gave notice of his intention to oppose him, on the ground that the debt was fraudulently contracted. To induce the latter to withdraw his opposition, the insolvent agreed to execute within three days after his discharge, a warrant of attorney for the debt, and, in the mean time, to give a promissory note of a third person for the amount, which was to be delivered up on the execution of the warrant of attorney. The insol-

vent was discharged, and the warrant of attorney was executed on the delivery up of the note. The court set aside the warrant of attorney, and the judgment entered up thereon, on the ground that the agreement to which they were founded was contrary to the policy of the insolvent act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects, which the legislature intended to be distributed among all the creditors. *Jackson v. Davison*, T. 2 G. 4. 691

PROMISSORY NOTE.

1. A promissory note for the payment of 30*l.*, at three months after date, with interest from the date, requires a stamp applicable to a note not exceeding 30*l.* *Pruessing v. Ing*, H. 1 and 2 G. 4. 204
2. A promissory note, payable two months after sight, requires a stamp appropriated to a note, payable more than sixty days after sight, or two months after date, date and sight not being in this case synonymous. *Sturdy v. Henderson*, T. 2 G. 4. 592
3. Where a note stated that J. S. promised to pay to A. B., or order, a certain sum, and was signed J. S. or else J. G.: *Held*, that this was not a promissory note by J. G. within the statute of Anne, *Ferris v. Bond*, T. 2 G. 4. 679

RECTOR.

See Action on the Case, 3.

REMOVAL, ORDER OF.

The power given to magistrates, under 35 G. 3 c. 101, s. 2, of ordering the charges incurred during the suspension of an order of removal, to be paid by the parish to which the order is made, is confined to two cases only, viz, the death or removal of the pauper; and, therefore, where a pauper, during the suspension of an order of removal, became irremovable in consequence of an estate descending to him: *Held*, that such a case was not within the act; and that the pauper, not having been removed, no order for the payment of any charges incurred during the suspension of the original order of removal could be made. *The King v. The Inhabitants of Chagford*, H. 1 and 2 G. 4. 235

RULES OF COURT.

196, 539

SCIRE FACIAS.

See Practice, 22.

SCOTCHMAN.

See Settlement

SESSIONS.

See Appeal, Notices or, 1.

1. The Court of K. B. has no jurisdiction to review the judgment of the quarter sessions, except on a case sent up for their consideration; and, therefore, where the sessions, having heard the witnesses on one side, had refused to hear those on the other side in an appeal, on the ground that their testimony had been prefaced by observations on the part of the advocate contrary to their usual practice, the court refused to grant a mandamus to rehear the appeal. *The King v. The Justices of Carnarvon*, M. 1 G. 4. 86
2. By 50 G. 3, c. 48, s. 25, it is provided, that any party aggrieved by the conviction under that act, who shall enter into a recognisance to appear at the next sessions, shall be at liberty to appeal to such sessions: *Held*, that this dispenses with the necessity of any notice of appeal; and that if the party duly enter into the recognisance, the sessions are bound to hear the appeal. *The King v. The Justices of Ewez*, H. 1 and 2 G. 4. 276
3. Where by charter, the magistrates of a borough, which was a county of itself, held only general sessions twice a year, and not quarter sessions: *Held*, that an appeal against an order of removal might be made to the next general sessions of the peace for such borough. *The King v. The Justices of Carmarthen*, H. 1 and 2 G. 4. 291

SETTLEMENT.

By stat. 59 G. 3, c. 12, s. 33, the wife and eight unemancipated children of a Scotchman, who has not acquired any settlement in England, must, if chargeable, be sent, by a paup, along with the husband to Scotland, and cannot be removed to the maiden settlement of the wife. *The King v. The Inhabitants of Leeds*, E. 2 G. 4. 498

SETTLEMENT—*By executing an Office*.

Where a pauper was legally sworn as a borsholder at a court-leet, and after executing the office for a few days, was afterwards irregularly, by two magistrates, discharged from executing his office, and another person appointed, but he acquiesced in this, and did not in fact afterwards execute the office: *Held*, that this was not executing an annual office within the parish so as to confer a settlement. *The King v. The Inhabitants of Holy Cross, Westgate*, T. 2 G. 4. 619

SETTLEMENT—*By Apprenticeship*.

By an indenture of apprenticeship it was stipulated, that the master should provide meat, &c. during the term, except in the winter seasons, when the ship to which the apprentice belonged should be laid

by unrigged; during which time the apprentice was to be maintained by himself or friends, the master paying a compensation. Under this stipulation, the apprentice, during the winter, resided with his parents in the township of B. for more than forty days, not doing any work for his master during such residence: *Held*, that this was not a residence under the indenture, and conferred no settlement. *The King v. The Inhabitants of Brotton*, M. 1 G. 4. 84

SETTLEMENT—By Hiring and Service.

A pauper having hired himself without specifying any time, entered into the service the day before New-Year's Day, and quitted two days after Christmas, receiving his full wages: that being the usual time that servants in that part of the country go into and leave their places. The court thought that this was a contract which had arrived at its termination be'fore the expiration of a year; but the sessions having expressly found it to be a hiring and service for a year, the court considered themselves as bound by that finding. *The King v. The Inhabitants of Tyrelle*, T. 2 G. 4. 624

SETTLEMENT—By Renting a Tenement.

A pauper having hired a tenement of more than 10*l.* a year, resided in it more than forty days altogether, but only thirty-eight days before the passing of the 59 G. 3, c. 50: *Held*, that this conferred no settlement. *The King v. The Inhabitants of St. Mary-le-Bone*, T. 2 G. 4. 681

SHIP-OWNER.

A ship-owner is liable for necessary repairs done to a ship by the master's order, and the word "necessary" means such as are fit and proper for the vessel upon her voyage, and such as a prudent owner himself, if present, would order. *Webster v. Seekamp*, E. 2 G. 4. 352

STAMP.

1. A promissory note for the payment of 10*l.* at three months after date, requires a stamp applicable to a note not exceeding 30*l.* *Pruessing v. Ing*, H. 1. and 2 G. 4. 204
2. An act of parliament provided, that the M. Canal Company should not take any higher or greater rate of tonnage than should, for the time being, be taken by the B. Canal Company; and the latter, by a resolution at a general assembly, and under their common seal, reduced their tolls: *Held*, that the M. Canal Company could not question collaterally the validity of such resolution, but were bound by it.

The B. Canal Company's act directed, that no reduction of the tolls should take place, unless assented to by two-thirds

of the proprietors; but allowed them to vote by proxy, a form for which instrument was given by the act. *Quare, Whether such instrument requires to be stamped. The Monmouth Canal Company v. Kendall*, E. 2 G. 4. 453

3. A promissory note, payable two months after sight; requires a stamp appropriated to a note payable more than sixty days after sight, or two months after date, and sight not being in this case synonymous. *Sturdy v. Henderson*, T. 2 G. 4. 592

SURRENDER OF COPYHOLD.

See LIMITATION.

TRESPASS.

See COSRS, 1.

In trespass, the declaration was for taking goods, chattels, and effects: *Held*, that the plaintiff might recover the value of fixtures under these words. *Pitt v. Shew*, H. 1 and 2 G. 4. 206

TITHES.

See PLEADING, 20.

TOLL.

See MARKET.

TROVER.

An exchequer bill, the blank in which was not filled up, having been placed for sale in the hands of A., he, instead of selling it, deposited it at his banker's, who made him advances to the amount of its value. It was held by three justices, *BATLEY*, J., dissentient, that the owner of the exchequer bill could not maintain trover against the bankers, the property in such exchequer bill, like bank notes and bills of exchange endorsed in blank, passing by delivery. *Wookey v. Pole*, M. 1 G. 4. 1

VARIANCE.

1. Declaration stated, that defendant bargained for and bought of plaintiffs a quantity of E. I. rice, according to the conditions of sale of the E. I. Company, to be put up at the next E. I. Company's sale by the proprietors, if required, at a certain price, there mentioned. The proof was, that besides these conditions, the rice was sold per sample. This is no variance; the words "per sample" not being a description of the commodity sold, but a collateral engagement that it shall be of a particular quality. *Parker v. Palmer*, E. 2 G. 4. 387
2. In assumpsit, for not indemnifying plaintiff, in consequence of his having become bail for A. in an action at the suit of B., it was stated that B., in

Michaelmas term 58 G. 3, recovered against plaintiff. The judgment given in evidence was in Hilary term: *Held*, that this was no variance, inasmuch as this was not matter of description, but an allegation in substance that the judgment had been obtained before the commencement of this action. *Phillips v. Shaw*, E. 2 G. 4. 435

VENDOR AND VENDEE.

1. A defendant bargained for and bought of the plaintiffs a quantity of E. L rice, per sample. The rice did not correspond with the sample; but the defendant, after seeing fresh samples, inferior in quality to the original purchase-sample, put it up at the E. L Company's sale, at a limited price; and no bidding taking place to that extent, he bought it in: *Held*, that he could not afterwards repudiate the contract. *Parker v. Palmer*, E. 2 G. 4. 387
2. A quantity of oats having been consigned by a merchant abroad, to be sold by J. S., who was a merchant as well as factor, he placed them in the hands of A., a corn-factor, as a security for advances made by him; but the oats were not to be sold without the consent of J. S. They remained in A.'s possession, upon these terms, for nine months, when they were transferred to A. by a sale at the market price. No money actually passed, nor were any account sales rendered; but the amount of the price was allowed in account between J. S. and A., leaving a balance in favour of the latter: *Held*, that this was in substance a pledge, and not a sale by the factor; and that no property passed to A., although the jury had found it to be a bona fide transaction. *Kuckin v. Wilson*, E. 2 G. 4. 443

VESTRY.

1. The court will not compel the vestry clerk of a parish to produce, and permit copies to be taken of documents from the parish chest in his custody, for any other than parochial purposes. *May v. Guyenne*, H. 1 and 2 G. 4. 301
2. A select vestry for the management of the parish affairs, existing by ancient custom, cannot elect another select vestry for the management of the poor within the 59 G. 3, c. 12. *The King v. Woodman*, E. 2 G. 4. 507

USURY.

The court will set aside a judgment founded on an usurious security, without compelling the defendant to pay the principal and interest. *Roberts v. Goff*, M. 1 G. 4. 92

WILL.

1. A testator, by his will, devised to Matthew W., his brother, and Simon W., his brother's son, a certain estate. It appeared that the testator had three brothers, each of whom had a son of the name of Simon living at the time of the testator's death: *Held*, that the proof of this fact did not raise any latent ambiguity in the will, so as to let in parol evidence of declarations of the testator as to the person intended, it being clear that the person entitled was Simon, son of Matthew. *Doe dem. Westlake v. Westlake*, M. 1 G. 4. 57
2. By letters patent, 24 Car. 2, the king granted to the use of A. his heirs and assigns, for ever, an annuity of 1000*l.*, to be paid out of his revenue of four and a half per cent, at Barbadoes and the Leeward Islands: *Held*, that this annuity was personal property, and duly passed under a will attested by two witnesses, by a residuary clause bequeathing all the rest, residue, and remainder of a testatrix's personal estate, of what nature or kind soever, to her executors. *Aubin v. Daly*, M. 1 G. 4. 59
3. Where a testator bequeathed all his houses and premises in W. to his wife for life; and, at her decease, to go to his eldest son, or surviving sons; and, in lack of sons, to daughters; and his copyhold land at L. to his eldest son; and, in case of his decease, to the eldest, and so on in rotation; and, in lack of sons, to daughters; and directed his personal property to be equally divided among the remaining children: *Held*, that the son who at the death of the testator was the eldest, under the will, and as heir at law, took a fee in the premises at W., subject to his mother's life estate, and a fee in the copyhold land at L. *Wright v. Stevens*, T. 2 G. 4. 574

WRIT.

See Practice, 11.





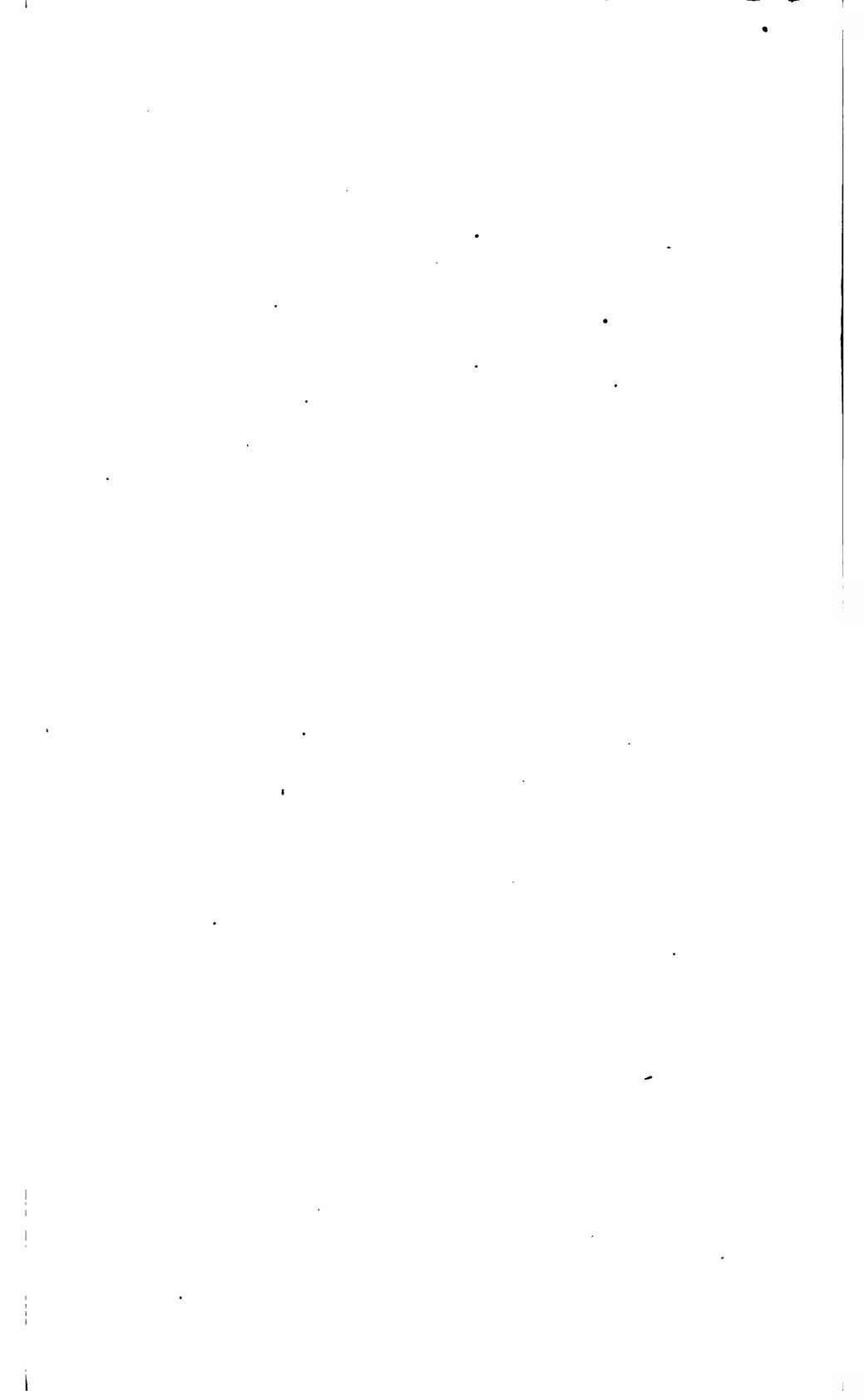
















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